FILED
AUG 22 2002

Nos. 01-593, 01-594

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

DEAD SEA BROMINE CO., LTD., *et al*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DOLE PETITIONERS

TERENCE M. MURPHY
JAMES S. TEATER
MICHAEL L. RICE
JONES, DAY, REAVIS & POGUE
2727 N. Harwood Street
Dallas, TX 75201
(214) 220-3939

ROBERT H. KLONOFF
Counsel of Record
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners Dole Food Company, Inc.; Dole Fresh Fruit Company; Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd.; Standard Fruit Company; Standard Fruit and Steamship Company; Standard Fruit Company de Honduras, S.A., and Standard Fruit Company de Costa Rica, S.A.

[Additional Counsel Listed on Inside Cover]

ROBERT G. CROW
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street, 25th Floor
Oakland, CA 94612

RICHARD C. SUTTON, JR.
RUSH, MOORE, CRAVEN, SUTTON, MOORY & BEH
2000 Hawaii Tower
745 Fort Street
Honolulu, HI 96813

Counsel for Petitioner AMVAC Chemical Corporation

SAMUEL E. STUBBS
WILLIAM D. WOOD
FULBRIGHT & JAWORKSI, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010

Counsel for Petitioners Chiquita Brands, Inc.; Chiquita Brands International, Inc.; and Maritrop Trading Corporation

ROBERT T. GREIG
BOAZ S. MORAG
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, NY 10006

JOHN R. MYRDAL
STANTON CLAY CHAPMAN CRUMPTON & IWAMURA
East Tower, Suite 2100
700 Bishop Street
Honolulu, HI 96813

Counsel for Petitioners Del Monte Fresh Produce N.A., Inc.; Del Monte Fresh Produce Hawaii, Inc.; Del Monte Fresh Produce Company; and Fresh Del Monte Produce N.V.

Michael L. Brem
F. Walter Conrad, Jr.
BAKER & BOTTS, L.L.P.
910 Louisiana Street
Houston, TX 77002

Counsel for Petitioner The Dow Chemical Company

D. FERGUSON MCNIEL, III
CHARLES W. SCHWARTZ
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, TX 77002

Counsel for Petitioner Occidental Chemical Corporation

JOHN T. KOMEIJI
ROBERT T. TAKAMATSU
WATANABE, ING & KAWASHIMA
999 Bishop Street, Suite 2300
Honolulu, HI 96813

Counsel for Petitioner Pineapple Growers Association of Hawaii

R. BURTON BALLANFANT
SHELL OIL COMPANY
4856 One Shell Plaza
900 Louisiana Street
Houston, TX 77002

DALE W. LEE
KOBOYASHI, SUGITA & GODA
999 Bishop Street, Suite 2600
Honolulu, HI 96813

Counsel for Petitioner Shell Oil Company

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 provides comprehensive rules governing suits against foreign governments and their agencies or instrumentalities. This statute defines the term "agency or instrumentality of a foreign state" to include any entity incorporated in a foreign country "a majority of whose shares or other ownership interest is owned" by the government of that country. 28 U.S.C. § 1603(b)(2). The petitioners in No. 01-594, Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited, are incorporated in Israel and were indirectly owned by the Israeli government through their parent corporations at the time of the conduct at issue in this suit. This case presents the following questions:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences suit against the corporation.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

In the proceedings below, the plaintiffs-appellants were respondents Gerardo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, Fernando Jiminez Arias, Santos Leandros, Herman Romero Aguilar, Elias Espinoza Merelo, Hooker Era Celestino, Alirio Manuel Mendez, and Carlos Humberto Rivera.

The defendants-appellees were the petitioners in No. 01-593: Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. (incorrectly sued below as Fresh Del Monte, N.V.).

The third-party defendants/cross-appellants were the petitioners in No. 01-594: Dead Sea Bromine Co., Ltd., and Bromine Compounds Limited.

Page ii of the petition in No. 01-594 contains a corporate disclosure statement for Dead Sea Bromine Co., Ltd., and Bromine Compounds Limited. Pages ii-iv of the petition in No. 01-594 contain a corporate disclosure statement for the Dole Petitioners. This latter statement remains correct but for one exception: there is no longer any publicly held corporation that owns 10% or more of the stock of Chiquita Brands International, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. COMPANIES INDIRECTLY OWNED BY FOREIGN GOVERNMENTS THROUGH THEIR CORPORATE PARENTS CAN QUALIFY AS AGENCIES OR INSTRUMENTALITIES UNDER THE FSIA 14

A. The FSIA's Majority Ownership Requirement Is Naturally Read to Include Companies Majority Owned by a Foreign Government through their Parent Corporations 15

1. In Ordinary Speech, the Majority Shareholder in a Corporation Is Said to "Own" the Subsidiaries of that Corporation . 16

2. The Majority Shareholder in a Corporation Also Has an "Ownership Interest" in the Subsidiaries of that Corporation 21

TABLE OF CONTENTS
(continued)

Page

B. The Natural Reading of the Majority Ownership Requirement Is Supported by the FSIA's Goal of Protecting Foreign Relations 23

C. The Legislative History of the FSIA Also Supports the Natural Reading of the Majority Ownership Requirement 28

D. The Natural Reading of the Majority Ownership Requirement Is Consistent with the Historical Treatment of Companies Indirectly Owned by the Federal Government 29

II. THE ARGUMENTS AGAINST TREATING COMPANIES INDIRECTLY OWNED BY FOREIGN GOVERNMENTS AS AGENCIES OR INSTRUMENTALITIES UNDER THE FSIA ARE UNPERSUASIVE 32

III. THE PRIVATIZATION OF THE DEAD SEA DEFENDANTS DOES NOT STRIP THEM OF THE PROTECTIONS THEY ENJOYED AS AGENCIES OR INSTRUMENTALITIES OF ISRAEL 40

A. The Present Tense Can Be, and in the FSIA Is, Used to Refer to Conduct Prior to Suit 40

B. The Context in Which the Majority Ownership Requirement Is Used Shows that It Can Be Applied to Ownership at the Time of the Conduct Underlying Suit 43

TABLE OF CONTENTS
(continued)

Page

C. The FSIA's Goal of Protecting Foreign Relations Supports Application of the Majority Ownership Requirement to the Time of the Conduct Underlying Suit 45

D. The Lower Court's Arguments for Applying the Definition of Agency or Instrumentality Only at the Time of Filing Are Unpersuasive 46

CONCLUSION 49

TABLE OF AUTHORITIES

Page

In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996) ... 29, 38
Am. Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988) 19
Anderson v. Abbott, 321 U.S. 349 (1944) 35
Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R. Co., 417 U.S. 703 (1974) 12, 19, 20, 35
Bartnicki v. Vopper, 532 U.S. 514 (2001) 17
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 34
Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012 (2d Cir. 1993) 45
Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981) 25
Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946) 30
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 22, 33
Clallam Cty. v. United States, 263 U.S. 341 (1923) . 30, 31
Clark v. Uebersee Finanz-Korporation, 332 U.S. 480 (1947) 27
Coalition for Clean Air v. S. Cal. Edison Co., 971 F.2d 219 (9th Cir. 1992) 40
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 27, 35
Costello v. INS, 376 U.S. 120 (1964) 41
Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001) 8, 14, 15
Duncan v. Walker, 533 U.S. 167 (2001) 32
Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937 (7th Cir. 2000) 42
First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S.611 (1983) ... 25, 28, 35, 45

TABLE OF AUTHORITIES
(continued)

Page

Flink v. Paladini, 279 U.S. 59 (1929) 16, 33
Food & Drug Adm'n v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 23
Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995) 9, 17, 18
Gen. Elec. Capital Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993) 40, 45
Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) 40
Grove v. Rizzolo, 441 F.2d 1153 (3d Cir. 1971) 44
Hallstrom v. Tillamook Cty., 493 U.S. 20 (1989) 15
JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd., 122 S. Ct. 2054 (2002) 24
Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, 343 U.S. 156 (1952) 21
Kiefer & Kiefer v. Reconstruction Finance Corp., 306 U.S. 381 (1939) 30
Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) 29, 30
Mitchell v. Forsythe, 472 U.S. 511 (1985) 44
Musopole v. South African Airways (Pty.) Ltd., 172 F. Supp. 2d 443 (S.D.N.Y. 2001) 38, 39
NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960) 35
In re Navarre Corp. Sec. Litig., 295 F.3d 791 (8th Cir., 2002) 17
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 44
Paulsen v. Comm'r, 469 U.S. 131 (1985) 21
Pere v. Nuovo Pignone, Inc., 150 F.3d 477 (5th Cir. 1998) 40
Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995) 44

TABLE OF AUTHORITIES
(continued)

Page

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 3, 25
S.F. Nat'l Bank v. Dodge, 197 U.S. 70 (1905) 21
Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir. 1985) 8
Smith v. United States, 508 U.S. 223 (1993) 16
Estate of Soler v. Rodriguez, 63 F.3d 45 (1st Cir. 1995) 18
Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115 (4th Cir. 1991) 19
In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230 (3d Cir. 1994) 39, 40
The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 3, 45
The Western Maid v. Thompson, 257 U.S. 419 (1922) 43
United States v. Johnson, 383 U.S. 169 (1966) 44
United States v. Texas, 507 U.S. 529 (1993) 44
Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) 2, 3, 4, 24
Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 19
Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002) 42
Williams v. Taylor, 529 U.S. 420 (2000) 16, 33

STATUTES, REGULATIONS & RULES

5 U.S.C. App. 1, Reorganization Plan No. 22 of 1950 .. 17
7 U.S.C. § 1a(8) 36
7 U.S.C. § 941 30
7 U.S.C. § 1503 30
12 U.S.C. § 221a(b)(4) 36

TABLE OF AUTHORITIES
(continued)

Page

12 U.S.C. § 831r 30
12 U.S.C. § 1283 30
12 U.S.C. § 1441a 30
12 U.S.C. § 1452 30
12 U.S.C. § 1813(w)(4)(A) 36
12 U.S.C. § 1819 30
12 U.S.C. § 3106(c)(1) 36
15 U.S.C. § 714 30
15 U.S.C. § 1802(3) 37
22 U.S.C. § 290f 30
22 U.S.C. § 2191 30
22 U.S.C. § 5605(b)(2)(F)(i)(II) 37
26 U.S.C. § 482 37
28 U.S.C. § 254d 44
28 U.S.C. § 1254(1) 1
The Foreign Sovereign Immunities Act, 28 U.S.C.
§§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 2
28 U.S.C. § 1303(a) 5
28 U.S.C. § 1330 ..... 4, 5, 24, 40
28 U.S.C. § 1391 ..... 5, 6
28 U.S.C. § 1441 ..... 5, 24, 39
28 U.S.C. § 1603 ..... *passim*
28 U.S.C. § 1604 4
28 U.S.C. § 1605 ..... *passim*
28 U.S.C. § 1606 ..... 5, 6
28 U.S.C. § 1608 ..... 4, 5, 6, 38, 48
28 U.S.C. § 1609 ..... 4, 6, 48
28 U.S.C. § 1610(b) 6, 48
28 U.S.C. § 2402 5
28 U.S.C. § 2674 5
30 U.S.C. § 184(a) 37
47 U.S.C. § 702(7) 37

TABLE OF AUTHORITIES
(continued)

Page

Government Corporation Control Act, Pub. L. No. 79-248, Title I, § 101, 59 Stat. 597, 597-98 (1945) 17
Pub. L. No. 107-117, § 208 (2002) 2
Pub. L. No. 107-77, § 626(c) (2001) 2
47 C.F.R. § 1.2110(c)(2)(ii)(G) 22, 38
47 C.F.R. § 20.6(d)(8) 22
47 C.F.R. § 22.942(d)(7) 22
47 C.F.R. § 63.09(f) 22
47 C.F.R. § 101.538(b)(2) 22
Fed. R. Civ. P. 4(d)(3) 6, 48
Fed. R. Civ. P. 12(a) 5
Fed. R. Civ. P. 55(e) 5
H.R. Rep. No. 94-1487 ..... *passim*
S. Rep. No. 94-1310 (1976) 4

INTERNATIONAL MATERIALS

European Convention on State Immunity and Additional Protocol, May 16, 1976, Eur. T.S. No. 74, art. 27, § 1 36
State Immunity Act, 1978, c.33, § 14 (Eng.) 36
Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, art. 3945 43

MISCELLANEOUS

Anderson's Dictionary of Law (1889) 21
Bestobell Buing Minority, Fin. Times (London), July 26, 1984 19
Black's Law Dictionary (6th ed. 1990) 20
Jennifer Bowles, *"Debt": A Game Show for the Credit-Card '90s*, The Washington Post, July 6, 1997 16
Black's Law Dictionary (7th ed. Abridged 1999) 29

TABLE OF AUTHORITIES
(continued)

Page

Phillip I. Blumberg, *Control and the Partly Owned Corporation: A Preliminary Inquiry into Shared Control*, 10 Fla. J. Int'l L. 419 (1996) 22, 27, 37
Charles N. Brower *et al.*, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 Am. J. Int'l L. 200 (1979) 35
John R. Cribbett & Corwin W. Johnson, *Principles of the Law of Property* (1989) 33
2 Arthur Stone Dewing, *The Financial Policy of Corporations* (5th ed. 1953) 25
Reed Dickerson, *Legislative Drafting* § 6.5(a) (1977) .. 41
Doubts over Murdoch Bid for Satellite Company, Fin. News (London), Oct. 29, 2001, 2001 WL 12508516 16
8 *Encyclopedia Americana* (1999) 6
Lawrence E. Filson, *The Legislative Drafter's Desk Reference* § 21.3 (1992) 41
1 *Fletcher's Cyclopedia of the Law of Private Corporations* § 43 (perm. ed. rev. vol. 1999) 16
11 *Fletcher's Cyclopedia of the Law of Private Corporations* § 5100 (perm. ed. rev. vol. 1999) 21
Flexi-Van Completes Tender for Purchase of Castle & Cooke, Inc., Wall St. J., July 17, 2000, 2002 WL-WSJ 3036717 18
Foreign Sovereign Immunities Act of 1975: Section-by-Section Analysis 1 (1975) ..... *passim*
Gen. Accounting Office, *Reference Manual of Government Corporations* 18, 19, 30, 31, 40, 41
Sidney Greenbaum *et al.*, *A Grammar of Contemporary English* § 3.25 (1972) 40
Thomas C. Hayes, *Tactic by Belzbergs Backfires*, N.Y. Times, Mar. 2, 1984 19

TABLE OF AUTHORITIES
(continued)

Page

House Legislative Counsel's Manual on Drafting Style, HLC 104-1, § 351(f)(1) 41
Peter W. Huber *et al.*, *Federal Communications Law*, §§ 7.4.1, 10.4.3.2 (2d ed. 1999) 21
Laura M. Holson, *These Guys Got Game: An Empire in the Making*, N.Y. Times, Nov. 11, 2001 16
Letter from Robert Ingersoll & Harold R. Tyler to Carl O. Albert, (Oct. 31, 1975) *reprinted in* H.R. Rep. No. 94-1487 (1976) ..... *passim*
Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385 (1982) 4, 27, 31
Anjali Kumar, *The State Holding Company: Issues and Options* (World Bank Discussion Paper No. 187, 1992) 25, 26
Charles Lewis, *State and Diplomatic Immunity* (1990) 44
Max Radin, *Law Dictionary* (Lawrence G. Greene ed. 1955) 21
News Summaries, The Economist, Feb. 10, 2001 16
Michael Sandler *et al.*, *Sovereign Immunity Decisions of the Department of State: May1952 to January 1977, reprinted in* John A. Boyd, *Digest of United States Practice in International Law* (1977) 4
Sarah Schaffer, *NiSource Turns up Heat on Columbia; Shareholders to See $5.7 Billion Bid*, The Washington Post, June 25, 1999 18
Eric Schopler, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 ALR 322 § 6[b] (1969) 34

TABLE OF AUTHORITIES
(continued)

Page

Vernon Setser, *The Immunity Waiver for State-Controlled Business Enterprises in the United States Commercial Treaties*, 1961 Proc. Am. Soc'y Int. L. 89 28

Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises under the Foreign Sovereign Immunities Act*, 90 Colum. L. Rev. 2278 (1990) 27

2A Norman J. Singer, *Statutes & Statutory Construction* (6th ed.2000) 22, 33, 38

Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. (1952) 3

Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, U.S.-Israel, art. XVIII(3), 5 U.S.T. 550 28

United Nations, *Organization, Management, and Supervision of Public Enterprises in Developing Countries* (1973) 25

Judith Valente, *Grand Met Sets Sale of Alpo Unit to Nestle SA*, Wall St. J., Sept. 20, 1994 16

Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention*, 26 Harv. Int'l L.J. 103 (1985) 27

Robert B. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33 (1978) 31, 48

6 *West's Encyclopedia of American Law* 187 (1998) 20

TABLE OF AUTHORITIES
(continued)

Page

Working Group of the Am. Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489 (2002) 46

14C Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3729.1 (3d ed. 1998) 8

BRIEF FOR THE DOLE PETITIONERS[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 251 F.3d 795. The opinion of the district court (Pet. App. 24a-78a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on May 30, 2001. A petition for rehearing was denied on July 10, 2001. The petition for a writ of certiorari was filed on October 5, 2001. On June 28, 2002, the petition in this case was granted, and this case was consolidated with No. 01-594. This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Foreign Sovereign Immunities Act defines the term "agency or instrumentality of a foreign state" to mean any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or

---

[1] The "Dole Petitioners" are the petitioners in No. 01-593: Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V.

> other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b); *see also id.* § 1603(a) (defining a foreign state to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state"). The Foreign Sovereign Immunities Act is reprinted in full in the petition in No. 01-593 at Pet. App. 108a-25a.[2]

STATEMENT

The Foreign Sovereign Immunities Act (the "FSIA" or the "Act"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11, provides comprehensive rules for suits against foreign governments and their affiliated entities. These rules govern the availability of foreign sovereign immunity, jurisdiction over suits involving foreign governments and their entities, as well as the procedures for such suits. *See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488, 495 n.22 (1983). In this case, two corporations — Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited (the "Dead Sea Companies") — that plaintiffs themselves have described as "*majority-owned by the State of Israel*"[3] attempted to invoke the procedural protections that the Act affords to agencies or instrumentalities of foreign governments. However, because the State of Israel owned these companies indirectly through their corporate parents, the lower court held that neither could

---

[2] Since the filing of the petition, there have been two minor amendments to the Act that are irrelevant to the issues here. *See* Pub. L. No. 107-117, § 208 (2002) (amending 28 U.S.C. § 1605(a)(7)(A)); Pub. L. No. 107-77, § 626(c) (2001) (same). The current version of the provision affected by these amendments is included in the addendum to this brief at Add. 1a-2a.

[3] Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001) (Nos. 99-16524 & 99-16770) (emphasis added).

qualify as an entity "a majority of whose shares or other ownership interest is owned by a foreign state" under the FSIA's definition of agency or instrumentality. 28 U.S.C. § 1603(b)(2). Accordingly, this case presents the question whether indirect ownership can satisfy the definition's majority ownership requirement. In addition, this Court has ordered the parties to address whether the Dead Sea Companies lost the protections afforded agencies or instrumentalities because of their privatization more than a decade after the conduct at issue in this suit.

The Foreign Sovereign Immunities Act — The FSIA was designed "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." Letter from Robert S. Ingersoll & Harold R. Tyler to Carl O. Albert, October 31, 1975, *reprinted in* H.R. Rep. No. 94-1487, at 45 (1976) [hereinafter "Ingersoll Letter"]. Although for many years foreign governments were treated as absolutely immune from suit, *see Verlinden*, 461 U.S. at 486; *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.), in 1952 the State Department adopted the so-called "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984 (1952); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) (deferring to the State Department's suggestions on foreign sovereign immunity). Application of the restrictive theory proved troublesome for the State Department because, among other things, foreign governments began to seek "suggestions of immunity" from the Department through application of diplomatic pressure. *See Verlinden*, 461 U.S. at 487-88; *see generally* Michael Sandler *et al.*, *Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977*, *reprinted in*

John A. Boyd, *Digest of United States Practice in International Law* 1017, 1018-19 (1977). Accordingly, in 1975, the State Department and Department of Justice proposed to Congress a bill "leaving sovereign immunity decisions exclusively to the courts" and "discontinuing the practice of judicial deference to 'suggestions of immunity' from the Executive Branch." *Foreign Sovereign Immunities Act of 1975: Section-by-Section Analysis* 1 (1975) [hereinafter "*FSIA Section-by-Section Analysis*"].[4] With a few minor amendments not relevant here, *see* H.R. Rep. No. 94-1487, at 10-11 (1976), this bill became the FSIA.

In transferring responsibility for determining foreign sovereign immunity to the courts, the FSIA codified and refined the restrictive theory of foreign sovereign immunity. Specifically, the Act provides that foreign states are generally immune from suit, *see* 28 U.S.C. § 1604, but enumerates a number of exceptions to that general rule, *see id.* § 1605(a), (b) & (d), including cases in which foreign states waive their immunity by contract or treaty, commit ordinary torts in the United States, or engage in "commercial activity" substantially related to the United States. *Id.* §§ 1605(a)(2) & (a)(5). A similar presumption and set of exceptions govern the immunity of foreign states from attachment of, and execution on, their property. *See id.* §§ 1609-11. The FSIA also provides procedures for serving process on foreign governments, and it authorizes courts to exercise personal jurisdiction over them based upon such service. *See id.* §§ 1330(b), 1608(a); *see generally* Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385, 396-410 (1982) (noting that the FSIA's service and personal jurisdiction provisions permitted abolition of the diplomatically irritating practice of attaching property to obtain jurisdiction over foreign sovereigns).

---

[4] Most portions of this section-by-section analysis are reprinted verbatim in the House and Senate reports on the FSIA. *See* H.R. Rep. No. 94-1487, at 12-33 (1976); S. Rep. No. 94-1310, at 11-32 (1976).

The FSIA also provides comprehensive procedures for cases in which claims are asserted against foreign governments, including protections for foreign governments when they are not immune from suit. In view of the "potential sensitivity of actions against foreign states," *FSIA Section-by-Section Analysis* 2, *reprinted in* H.R. Rep. No. 94-1487, at 13, the Act confers upon federal courts original jurisdiction "without regard to amount in controversy" over suits against foreign governments that are not barred by immunity, 28 U.S.C. § 1330(a), and it permits foreign governments to remove civil actions involving them, whether barred by sovereign immunity or not, to federal court "at any time for cause shown." *Id.* § 1441(d).

In addition, the FSIA provides foreign governments with many procedural protections enjoyed by the federal government in suits against it. Like the federal government, foreign governments are not liable for punitive damages, and they are not subject to jury trials in cases commenced in federal court or removed by them to federal court. *Compare id.* §§ 1303(a), 1441(d) & 1606 *with id.* §§ 2402 & 2674. The Act also contains provisions concerning default judgments, answers, and venue that are similar to those applicable to the federal government. *Compare id.* § 1391(f) (venue), *id.* § 1608(d) (answer), *and id.* § 1608(e) (default judgments) *with id.* § 1391(e) (venue), Fed. R. Civ. P. 12(a) (answer), *and* Fed. R. Civ. P. 55(e) (default judgments).

The FSIA extends some of the immunities and other protections it affords to foreign governments to their agencies and instrumentalities by defining the term "foreign state" to include such entities. *See* 28 U.S.C. § 1603(a). The Act in turn defines an agency or instrumentality of a foreign state to be any entity that is (1) a separate legal entity, (2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) neither a citizen of the United States nor created under the laws of a

third country. *Id.* § 1603(b). However, the immunities and other protections that the Act extends to agencies or instrumentalities of foreign governments are not as extensive as those afforded to foreign governments themselves. For example, the Act does not afford agencies or instrumentalities any protection against punitive damages, *see id.* § 1606, and it narrows the immunities afforded them from suit and from execution. *See id.* §§ 1605(a)(3), 1610(b). In addition, the Act subjects agencies or instrumentalities to service and venue provisions similar to those applicable to ordinary corporations. *Compare id.* § 1391(f) (venue) *and id.* § 1608(b)(2) (service) *with id.* § 1391(c) (venue) *and* Fed. R. Civ. P. 4(d)(3) (process).

The Dead Sea Companies — The Dead Sea, a landlocked salt lake located between Israel and Jordan, is rich in bromine, magnesium, potassium, and other valuable minerals. 8 *Encyclopedia Americana* 551 (1999). Since 1961, the Israeli government has given a company incorporated by it, Dead Sea Works, Ltd., the exclusive right to mine, quarry, and otherwise extract the minerals in and beneath the Dead Sea. J.A. 127. In turn, Dead Sea Works has given one of its subsidiaries, Dead Sea Bromine Co., Ltd., the exclusive right to obtain bromine and bromine compounds from the Dead Sea. J.A. 155-56. These chemicals are both sold by Dead Sea Bromine in their elemental form and fabricated into other chemical compounds by its subsidiary, Bromine Compounds, Ltd. J.A. 70.

Because the Dead Sea is one of the most important (and relatively few) natural resources in Israel, the Israeli government has exercised close control over the exploitation of the Dead Sea's mineral resources. From at least the late 1960s through the early 1990s, the Israeli government exercised this control through ownership of a multi-tiered corporate enterprise. Up until 1975, Israel held over 99% of the shares in Dead Sea Works, which in turn held over 99% of the shares of Dead Sea Bromine. J.A. 71-72, 86, 95. In 1975,

the Israeli government transferred its shares in Dead Sea Works to Israel Chemicals, Ltd., a company that the Israeli government wholly owned. J.A. 82. Since that time, Israel Chemicals, Ltd. has owned at least 88% of the shares in Dead Sea Works. J.A. 82, 95. Accordingly, as depicted in the first fold-out chart in the addendum, Add. 3a, through Dead Sea Works and later Israel Chemicals, from the late 1960s to the early 1990s Israel owned between 88% and 99% of the shares of Dead Sea Bromine. Although the ownership structure of Bromine Compounds was more complex, as depicted in the other chart in the addendum, Add. 4a, during the same period Israel owned between 66% and 88% of the company's shares through its corporate parents. J.A. 86-88, 92-94.

When Israel owned the Dead Sea Companies, those companies qualified as "government subsidiary companies" under Israeli law because the government had the power to appoint a majority of both their boards. J.A. 75, 177. As a consequence, the Dead Sea Companies were subject to special government regulation and oversight, which Israel actively exercised by, among other things, appointing representatives to the companies' boards, monitoring board meetings, establishing audit procedures, and reviewing budgets, plans, and operations. Pet. App. 22a; J.A. 76-79, 175-222. Moreover, when the Israeli government began privatizing the Dead Sea enterprise in 1992, the articles of association of the Dead Sea Companies were amended to give Israel a "Special State Share" requiring the government's consent to any reorganization of the companies or sale of a substantial block of their stock. J.A. 73-74, 104-09, 118-23; *see also* J.A. 107-08, 121-22 (recognizing Israel's "[v]ital [i]nterests" in the management of the companies and their exploitation of the Dead Sea).

DBCP and the Litigation over its Use — While Israel owned the Dead Sea Companies, the companies produced a pesticide named dibromochloropropane ("DBCP"). J.A. 13. DBCP was widely used in the United States and around the

world through the 1970s on a variety of agricultural crops, including bananas. J.A. 26. In the late 1970s, the Dead Sea Companies sold DBCP to one of the Dole Petitioners. J.A. 13, 24. In 1979, however, the pesticide's registration in the United States was canceled for most uses following reports of infertility in factory workers producing the chemical. J.A. 33.

As detailed in the petition (Pet. 4-6), since the early 1980s, farm workers from Costa Rica, Ecuador, Guatemala, Panama, and elsewhere claiming to have been injured by exposure to DBCP in their home countries have been filing suits in this country against major fruit growers and chemical manufacturers. The first such suits were brought in Florida against domestic DBCP manufacturers and were dismissed under the doctrine of *forum non conveniens*. *See Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985) (per curiam). Undaunted, foreign plaintiffs and their lawyers have continued to file DBCP suits throughout the United States, bringing actions against growers who used DBCP as well as domestic manufacturers of the pesticide in state courts in California, Texas, Florida, Louisiana, Mississippi, and in this case, Hawaii. Most of these suits, upon removal to federal court, have been dismissed under the *forum non conveniens* doctrine. Pet. 6 n.1.

Hoping to avoid this result, many DBCP plaintiffs filed suit in state courts in Texas during a period in which the doctrine was abrogated in those courts by state statute. Based on their sales of DBCP in the late 1970s for use on banana farms in the home countries of these plaintiffs, the Dead Sea Companies were impleaded into the Texas cases. *See Delgado v. Shell Oil Co.*, 231 F.3d 165, 169-72 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). Invoking one of the protections that the FSIA affords agencies or instrumentalities of a foreign government, the companies removed the cases to federal court, where the cases were dismissed for *forum non conveniens*. *See id.* at 172-75; *see also* 14C Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3729.1, at 238-42 (3d ed.

1998) (noting that the FSIA permits a foreign state that is a third-party defendant to remove the entire case to federal court). On appeal, the Fifth Circuit affirmed, holding, *inter alia*, that the claims against the Dead Sea Companies were *bona fide* and that the companies were agencies or instrumentalities of the Israeli government by virtue of the government's ownership of them. *See* 231 F.3d at 175-76, 177-81.

Proceedings Below — In 1997, another group of farm workers from Costa Rica, Ecuador, Guatemala, and Panama (represented by certain of the counsel in the Texas cases) sued banana growers and domestic chemical manufacturers in state court in Hawaii. J.A. 1, 15-52. These plaintiffs alleged injuries from exposure to DBCP used in their home countries from the 1960s through the mid-1980s. J.A. 26-27. Once again, the Dead Sea Companies were impleaded, and they removed the case to federal court based upon their status as agencies or instrumentalities of a foreign government. Pet. App. 5a. Dole Food Company, Inc. and its subsidiaries removed on the separate ground that the plaintiffs' claims were governed by the federal common law of foreign relations. *Id.*

When the plaintiffs moved to remand, the district court found that under a prior Ninth Circuit decision, *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the Dead Sea Companies did not qualify as agencies or instrumentalities under the FSIA because they were not directly owned by the Israeli government. Pet. App. 34a-39a. Finding, however, that the plaintiffs' claims were governed by federal common law, the district court held that it had jurisdiction and dismissed the case on *forum non conveniens* grounds. Pet. App. 77a-78a, 84a-95a.

On appeal, the Ninth Circuit reversed. In addition to holding the federal common law of foreign relations inapplicable, Pet. App. 5a-16a, the court of appeals ruled that

the Dead Sea Companies were not agencies or instrumentalities of the Israeli government because neither company qualified under *Gates* as an entity "'a majority of whose shares or other ownership interest is owned by a foreign state.'" Pet. App. 19a (quoting 28 U.S.C. § 1603(b)(2)).

In the Ninth Circuit's view, its earlier decision in *Gates* was controlling because that decision had interpreted the majority ownership requirement as "limiting an instrumentality to the first tier of ownership." Pet. App. 19a. The court of appeals also reasoned that indirect ownership of stock could not qualify as an "other ownership interest" under the FSIA because interpreting the term "other ownership interest" to cover such ownership would "make the majority-shareholder requirement superfluous." Pet. App. 20a. It therefore read the term "other ownership interest" to refer to "some other form of ownership not called shares of stock." *Id.* The court acknowledged that there was no apparent reason why federal courts should "care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation." Pet. App. 20a-21a. But it concluded that "none of this matters, because *Gates* decided this question, and we are bound by its authority." Pet. App. 21a.

The decision below also considered the privatization of the Dead Sea Companies before the plaintiffs brought suit in 1997. While acknowledging that every other court to consider this issue had held that privatization does not strip an entity of the protections it enjoyed under the FSIA for conduct prior to privatization, the Ninth Circuit did not "find this question as easy." Pet. App. 17a. The court of appeals began by asserting that, by its terms, the FSIA "applies only to an entity that 'is' a foreign state at the time of the suit." *Id.* The court then went on to argue that it was unclear whether the policies of the Act would be served by extending immunity to entities that are agencies or instrumentalities at the time of the underlying

conduct. Pet. App. 17a-18a. According to the court of appeals, the FSIA attempts to avoid affronting foreign governments "by making it hard to haul them into court" and by forcing parties with claims against those governments to seek "redress through diplomatic channels." Pet. App. 18a. Because diplomatic channels may be of little help "in resolving a dispute between private parties," and because a foreign government may not be forced to appear and defend itself in a suit against a former agency, the court concluded that there is "a plausible basis for not interpreting the FSIA to apply to privatized entities." Pet. App. 18a-19a.

In so doing, the court of appeals recognized that suits against former agencies of foreign states can implicate and involve those states, but reasoned that any affront caused by such suits "will be remote and indirect if [the foreign sovereign] is not held answerable for the harm it may have caused." Pet. App. 19a. However, because the question was "a close one," and not dispositive of the case in light of its other rulings, the lower court did not resolve the question. *Id.*

SUMMARY OF ARGUMENT

Recognizing the special interest that foreign governments have in their state-owned enterprises, the Foreign Sovereign Immunities Act treats companies that are majority owned by foreign governments as agencies or instrumentalities of those governments and therefore affords them a number of procedural protections against unfair treatment. In the decision below, the Ninth Circuit held that ownership under the FSIA must be direct and suggested that privatized companies lose any protections they enjoyed under the Act for conduct prior to privatization. As the language of the Act, its purposes, and other considerations demonstrate, the FSIA does not impose such rigid and artificial restrictions.

1. Under the FSIA, a company incorporated in a foreign country may qualify as an agency or instrumentality of a foreign government if a majority of the company's "shares or

other ownership interest is owned" by the government of that country. 28 U.S.C. § 1603(b)(2). This majority ownership requirement is naturally read to encompass ownership of a company through its parent corporations. In ordinary speech, the majority shareholder in a corporation is frequently said to "own" the assets of that corporation and its subsidiaries. It is therefore quite natural to say, as this Court did in *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R. Co.*, 417 U.S. 703 (1974), that the majority shareholder in a corporation "owns" the shares in the corporation's subsidiaries. In addition, as the word "interest" is the most general term that can be used to describe a property right, it is also natural to say that a majority shareholder in a corporation has an "ownership interest" in the subsidiaries of that corporation, especially where, as with the Dead Sea Companies, that ownership interest confers the ability to appoint the subsidiary's board of directors.

This interpretation is supported by one of the primary goals of the FSIA. The Act seeks to minimize the foreign relations problems that can arise from litigation involving foreign governments and affiliated entities by affording those parties a federal forum and other procedural protections. Drawing a distinction between direct and indirect ownership undermines this objective because a foreign government's interest in a company does not disappear when its ownership is indirect. To the contrary, countries choose to employ tiered corporate structures to ensure public control, to facilitate investment, to respond to emergencies, and for other reasons that in no way indicate a lack of interest in how those entities are treated in American courts. As a consequence, limiting the majority ownership requirement to direct ownership prevents companies in which foreign governments have a proprietary interest from enjoying the protections needed to minimize the risk of foreign affairs problems. Even worse, such a limitation may itself become a source of diplomatic friction because, in practice, it can lead to arbitrary results.

The natural reading of the majority ownership requirement is also supported by the legislative history of the Act, which shows that Congress intended the definition of agencies and instrumentalities to be applied broadly to a variety of different organizational forms. Indeed, the history specifically states that "mining enterprises," an apt description of the Dead Sea Companies, can qualify as agencies or instrumentalities under the Act. In addition, this conclusion is consistent with the treatment of companies indirectly owned by the federal government. Those companies have been consistently described and treated as agencies or instrumentalities of the United States. Because the structure of the Act evidences a congressional intent to provide foreign governments with procedural protections similar to those enjoyed by the federal government, companies indirectly owned by foreign governments should be treated as agencies or instrumentalities of those governments.

2. Although the lower court, the Solicitor General, and the respondents advance a number of arguments in favor of a distinction between direct and indirect ownership, those arguments are without merit. None of the arguments contains any serious analysis of the language of the majority ownership requirement, the purposes of the Act, or the history underlying it. Moreover, the Solicitor General's reliance on the principle of corporate separateness is misplaced because the FSIA's definition of agency or instrumentality explicitly rejects the principle and, even more importantly, because application of the principle is inconsistent with the Act's goal of protecting foreign relations.

3. A company that is majority owned by a foreign government at the time of the conduct at issue in a case does not lose the protections of the FSIA because it is privatized before suit. Although the majority ownership requirement is couched in the present tense, that fact does not determine the point in time at which the majority ownership requirement should be applied. The present tense is often used in timeless

statements such as definitions, and legislative drafters try whenever possible to use the present tense. Moreover, the context in which the majority ownership requirement is used shows that it should be applied to the time of the conduct underlying a suit, not the time of filing. Status-based immunities such as sovereign immunity are normally applied to the time of the conduct underlying a claim. As the majority ownership requirement determines whether companies are eligible for immunity and related protections under the FSIA, the requirement should be applied to privatized companies in the same manner.

Following this traditional practice would serve the FSIA's goal of minimizing foreign relations disruptions because foreign governments do not lose all interest in a company once that company is privatized. Indeed, foreign governments may in some circumstances be the real parties in interest in suits concerning the conduct of their agencies or instrumentalities before privatization. Accordingly, parties should not be stripped of the protections of the FSIA simply because they have been privatized prior to the filing of suit.

ARGUMENT

I. COMPANIES INDIRECTLY OWNED BY FOREIGN GOVERNMENTS THROUGH THEIR CORPORATE PARENTS CAN QUALIFY AS AGENCIES OR INSTRUMENTALITIES UNDER THE FSIA

Although the decision below acknowledged that the Dead Sea Companies were majority-owned by the Israeli government, it nonetheless held that they did not satisfy the majority ownership requirement in the Foreign Sovereign Immunities Act's definition of agency or instrumentality because Israel owned the companies indirectly through their corporate parents. The majority ownership requirement, however, "draws no distinction between direct and indirect ownership." *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th

Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001). It simply requires a foreign government to "own[]" a majority of the "shares or other ownership interest" in the company in question. 28 U.S.C. § 1603(b)(2). This simple, non-technical language is more than broad enough to encompass indirect ownership of a company through the company's parent corporations. Moreover, the general purposes of the FSIA, its legislative history, and the treatment of companies owned by the federal government all support this interpretation.

A. The FSIA's Majority Ownwership Requirement Is Naturally Read to Include Companies Majority Owned by a Foreign Government through their Parent Corporations

"'[T]he starting point for interpreting a statute is the language of the statute itself.'" *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 25 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Here, the relevant statutory language defines the term "agency or instrumentality of a foreign state" to mean any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). It is undisputed that the Dead Sea Companies are corporations created under the laws of Israel and that the Israeli government owned a majority of the companies through their corporate parents at the time of the conduct at issue in this case. Pet. App. 16a, 30a. As a

consequence, the issue before the Court is whether the second prong of the definition of the term "agency or instrumentality of a foreign state," the majority ownership requirement, is satisfied by indirect ownership of a majority of a company through its corporate parents. As demonstrated below, the language of the requirement is naturally read to encompass such ownership.

1. In Ordinary Speech, the Majority Shareholder in a Corporation Is Said to "Own" the Subsidiaries of that Corporation

As this Court has admonished, courts must "give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (quotations omitted). Because the word "own" in the majority ownership requirement is not defined by the FSIA and does not have any settled technical meaning, it must be interpreted "in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). Under such an interpretation, the majority ownership requirement can be satisfied by indirect ownership because in ordinary speech a foreign government can "own" a company by holding the shares of the company's corporate parents.

In common parlance, the shareholders of a corporation are frequently said to own the assets of the corporation, including the subsidiaries of those corporations. The Court has recognized that in "common speech" the shareholders of a corporation "would be called owners" of a ship owned by the corporation. *Flink v. Paladini*, 279 U.S. 59, 63 (1929) (Holmes, J.); *see also* 1 *Fletcher's Cyclopedia of the Law of Private Corporations* § 43, at 733-34 (perm. ed. rev. vol. 1999) ("The holding company may be regarded as the 'owner' of the subsidiary's property . . . ."). Moreover, because a subsidiary of a corporation is an asset of that corporation, the majority shareholder in a parent corporation is often said to

"own" the subsidiaries — both direct and indirect — of the parent. Examples of this usage can be found in the press,[5] legislation,[6] briefs submitted to this Court,[7] and judicial opinions.[8] In fact, it is so natural to say that a shareholder of

---

[5] *See, e.g.*, Laura M. Holson, *These Guys Got Game: An Empire in the Making*, N.Y. Times, Nov. 11, 2001, § 3, at 1 ("Through its subsidiaries, A.E.G. *owns* 60 percent of the Staples arena.") (emphasis added); Judith Valente, *Grand Met Sets Sale of Alpo Unit to Nestle SA*, Wall St. J., Sept. 20, 1994, § A, at 18 ("The Swiss food conglomerate, through its subsidiary Nestle USA, already *owns* Friskies PetCare.") (emphasis added); Jennifer Bowles, *"Debt"; A Game Show for the Credit-Card '90s*, The Washington Post, July 6, 1997, § B, at 3 ("The show is *owned* by The Walt Disney Co. through its subsidiary, Buena Vista Television.") (emphasis added). The same usage is also found in the English press. *See, e.g.*, *Doubts over Murdoch Bid for Satellite Company*, Fin. News (London), Oct. 29, 2001, *available at* 2001 WL 12508516 ("General Motors (GM), the car manufacturer . . . *owns* DirecTV through its subsidiary Hughes Electronics.") (emphasis added); *News Summaries*, The Economist, Feb. 10, 2001, at 2 ("DirecTV, an American satellite-TV company *owned* by General Motors through its Hughes subsidiary") (emphasis added).

[6] *See, e.g.*, Government Corporation Control Act, Pub. L. No. 79-248, Title I, § 101, 59 Stat. 597, 597-98 (1945) (describing subsidiaries of the Reconstruction Finance Corporation such as the "Defendant Plant Corporation; Defense Supplies Corporation; Metals Reserve Company; Rubber Reserve Company; War Damage Corporation" and "RFC Mortgage Corporation" as "wholly owned Government corporation[s]"); 5 U.S.C. App. 1, Reorganization Plan No. 22 of 1950 (message of the President describing Federal National Mortgage Association, a subsidiary of the government-owned Reconstruction Finance Corporation, as a "wholly owned Government corporation").

[7] *See, e.g.*, Brief *Amicus Curiae* of Media Entities and Organizations in Support of Respondents at 1a, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (Nos. 99-1687 & 99-1728) (noting that ABC, Inc. "owns, alone or through its subsidiaries, the ABC Television Network, the ABC Radio Network, ten television stations, and forty-five radio statutes").

[8] *See, e.g.*, *In re Navarre Corp. Sec. Litig.*, 295 F.3d 791, 795 (8th Cir. 2002) (stating that, "[t]hrough its subsidiary, NetRadio Corporation, Navarre also *owns* and operates NetRadio Network") (emphasis added); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1459 (9th Cir. 1995) (stating

a corporation owns the corporation's subsidiaries that, in their opening brief below, respondents themselves described the Dead Sea Companies as "majority-*owned* by the State of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001) (Nos. 99-16524 & 99-16770) (emphasis added).

Significantly, the United States government has described itself as the "owner" of the subsidiaries of the Reconstruction Finance Corporation (RFC), a corporation whose shares the government held. In 1945, in the *Reference Manual on Government Corporations*, the General Accounting Office surveyed existing government corporations, including their ownership and capital stock. Even though the RFC had "subscribed and paid for all of the capital stock" of at least six corporations, *see* Gen. Accounting Office, *Reference Manual of Government Corporations* 34, 40, 171, 214, 227, 280 (discussing the Defense Plant Corporation, Defense Supplies Corporation, Metals Reserve Corporation, RFC Mortgage Corporation, Rubber Reserve Company, and War Damage Corporation), the *Reference Manual* states that each of these corporations was "*owned* by the United States." *Id.* at 32-33 (Defense Plant Corporation) (emphasis added); *see also id.* at 39 (noting that the Defense Supplies Corporation "was owned by the United States"); *id.* at 170 (noting that the Metals Reserve Corporation "was owned by the United States"); *id.* at 183 (noting that the Petroleum Reserves Corporation, though a "subsidiary of the Reconstruction Finance Corporation," is "owned by the United States"); *id.* at 213 (noting that the RFC Mortgage Company was "owned by the United States through ownership of its stock by the

---

that Fletcher Fine Foods was "parent to a number of subsidiaries, and through these subsidiaries *owned* Golden Gate Fresh Foods ('GGFF')," and that Fletcher Fine Foods "*owned* GGFF") (emphasis added); *Estate of Soler v. Rodriguez*, 63 F.3d 45, 47 (1st Cir. 1995) (noting that hospital corporation "[t]hrough its subsidiary . . . *owns* and operates the Hospital Interamericano de Medicina Avanzada" in Puerto Rico) (emphasis added).

Reconstruction Finance Corporation"); *id.* at 226 (noting that the Rubber Reserve Company was "owned by the United States through ownership of its stock by the Reconstruction Finance Corporation"); *id.* at 279 (noting that the War Damage Corporation "is owned by the United States").

The majority shareholders in a corporation are also commonly said to "own" the shares in subsidiaries held by that corporation and its other subsidiaries. Here again, such statements can be found in the press,[9] in briefs filed with this Court,[10] and in lower court opinions.[11] Moreover, this Court has described a shareholder in a corporation as owning the shares held by a subsidiary of that corporation. In *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R. Co.*, 417 U.S. 703 (1974), two companies, Bangor Punta Corporation and its subsidiary Bangor Punta Operations, Inc. (BPO), were sued by a railroad (BAR). As this Court's opinion detailed,

---

[9] *See, e.g., Flexi-Van Completes Tender for Purchase of Castle & Cooke, Inc.*, Wall St. J., July 17, 2000, *available at* 2002 WL-WSJ 3036717 ("Flexi-Van, through a subsidiary, now owns 15.2 million shares, or 89%."); Sarah Schaffer, *NiSource Turns up Heat on Columbia; Shareholders to See $5.7 Billion Bid*, The Washington Post, June 25, 1999, § E, at 1 ("NiSource, through a subsidiary, owns Columbia stock."); *Bestobell Buying Minority*, Fin. Times (London), July 26, 1985, § F2, at 21 ("Bestobell, through its wholly-owned subsidiary, Bestobell Overseas, presently owns 4.49 m[illion] shares in BAL."); Thomas C. Hayes, *Tactic by Belzbergs Backfires*, N.Y. Times, Mar. 2, 1984, § D, at 1 ("Far West paid an average of about $44.30 a share for the 490,895 Gulf shares it owns through a subsidiary.").

[10] *See, e.g.*, Brief for Respondents in Opposition to Cert. at 1n.1, *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991) (No. 89-1448) ("FABI owned [First American Bank of Virginia] stock through a wholly-owned subsidiary, Virginia Bankshares, Inc.").

[11] *See, e.g., Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 120 (4th Cir. 1991) (noting that appellee "stipulated that, through its subsidiaries, it owned 100% of [a company's] common stock"); *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 285 (D.C. Cir. 1988) (noting that regulations apply to "holding company's indirect ownership of shares in nonbanking company owned directly by banking subsidiary").

the railroad was a former subsidiary of BPO. *See id.* at 705-06 ("Bangor Punta, through its subsidiary BPO, acquired 98.3% of the outstanding stock of BAR. This was accomplished by the subsidiary's purchase of all the assets of Bangor & Aroostock Corp. (B&A), a Maine corporation established in 1960 as the holding company of BAR."). Although BPO rather than Bangor Punta held title to the shares in the railroad, the majority opinion nonetheless stated that "Bangor Punta controlled and directed BAR *through its ownership* of about 98.3% of the outstanding stock" of BAR. *Id.* at 706 (Powell, J.) (emphasis added). Similarly, the dissent said that "Bangor Punta . . . *owned* the greater majority of the share[s] of respondent railroad." *Id.* at 722 (Marshall, J., dissenting) (emphasis added). Thus, in *Bangor Punta*, this Court described the majority shareholder (Bangor Punta) in a company (BPO) as having "owned" the shares that company held in its subsidiary (the railroad BAR).

If the FSIA's majority ownership requirement is read in light of this common and natural usage, indirect ownership of a majority of the shares in a corporation satisfies the requirement. In other words, if a foreign government holds 80% of the shares in a corporation that in turn holds 80% of the shares in a subsidiary, then the government effectively owns at least 64% of the subsidiary's shares (=80% of 80%), and the majority ownership requirement is satisfied. The Israeli government indisputably owned a majority of the shares of the Dead Sea Companies in this fashion. Like Bangor Punta, the Israeli government held virtually all of the shares of the ultimate parents (Dead Sea Works and then Israel Chemicals Ltd.) of the companies in question. As a consequence, if Bangor Punta could be said to "own" 98.3% of shares of the railroad held by a subsidiary of BPO because Bangor Punta held the shares of BPO, then the Israeli government must equally have "owned" from 66%-98% of the shares of the Dead Sea Companies because it likewise held the shares of their parent corporations.

2. The Majority Shareholder in a Corporation Also Has an "Ownership Interest" in the Subsidiaries of that Corporation

The Dead Sea Companies also qualify as agencies or instrumentalities of a foreign state because Israel had a "majority . . . ownership interest" in them by virtue of being the majority shareholder in their ultimate parent. 28 U.S.C. § 1603(b)(2).

Legal lexicographers have long recognized the word "interest" as the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* 812 (6th ed. 1990); *accord* 6 *West's Encyclopedia of American Law* 187 (1998) (describing the word "interest" as a "comprehensive term to describe any right, claim, or privilege that an individual has toward real or personal property"); Max Radin, *Law Dictionary* 169 (Lawrence G. Greene ed., 1955) ("A right or title of any extent"); *Anderson's Dictionary of Law* 562 (1889) ("any right, in the nature of property"). Accordingly, as this Court has recognized, the word "interest" can be used to describe the rights of a shareholder in a corporation to the property of that corporation. *See Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales*, 343 U.S. 156, 160 (1952) ("The innocent stockholder may not have title to corporate assets, but he does [have] an *interest*" in those assets.) (emphasis added); *S.F. Nat'l Bank v. Dodge*, 197 U.S. 70, 94 (1905) (describing the "share of each stockholder" as "an *interest* in the very property held by the corporation") (emphasis added); *see also Paulsen v. Comm'r*, 469 U.S. 131, 138 (1985) (noting that the shareholders in a savings and loan association have a "part *ownership interest* in the bricks and mortar, the goodwill, and all the other assets" of the association) (emphasis added); *id.* at 147 (O'Connor, J., dissenting) (noting that the stockholders in a savings and loan association "had a proportionate proprietary *interest* in the corporation's assets and net earnings") (emphasis added).

Indeed, it is hornbook law that "[s]hares of stock . . . represent a beneficial *interest* in the corporate property." 11 *Fletcher's Cyclopedia of the Law of Private Corporations* § 5100, at 93 (emphasis added). Thus, the phrase "ownership interest" is more than broad enough to describe the rights of a corporate shareholder in the subsidiaries of the corporation.[12]

Nor does it make any difference that the phrase "ownership interest" appears in the FSIA in a passage referring to "a majority of [] shares or other ownership interest." 28 U.S.C. § 1603(b)(2). Under the so-called *ejusdem generis* rule, when general words follow more specific ones, the general words are normally interpreted to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (quoting 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 273-74 (6th ed. 2000)). Here, because ownership of a majority of shares in a corporation is a traditional measure of control over a corporation, *see, e.g.*, Phillip I. Blumberg, *Control and the Partly Owned Corporation: A Preliminary Inquiry into Shared Control*, 10 Fla. J. Int'l L. 419, 422 (1996), the reference to "other ownership interest" in the majority ownership requirement is naturally interpreted to refer to the class of ownership interests that confers a similar measure of control. Thus, purely financial interests such as bonds,

---

[12] The Federal Communications Commission uses the phrase "ownership interest" in this manner in its regulations. In applying restrictions upon the concentration of ownership and eligibility for set-aside programs, *see, e.g.*, Peter W. Huber *et al.*, *Federal Communications Law* § 7.4.1, at 610 (2d ed. 1999) (discussing concentration-of-ownership rules); *id.* § 10.4.3.2, at 920 (set-aside programs for PC auctions), the FCC examines the "*[o]wnership interests* that are held indirectly by any party through one or more intervening corporations." 47 C.F.R. § 20.6(d)(8) (emphasis added); *accord, e.g., id.* §§ 1.2110(c)(2)(ii)(G), 22.942(d)(7), 63.09(f), 101.538(b)(2)(vii). Thus, under FCC rules, "if A owns 20% of B, and B owns 40% of licensee C, then A's interest in licensee C would be 8%." *Id.* § 20.6(d)(8).

preferred stocks, and liens would not qualify as an "other ownership interest" under the FSIA. But indirect ownership of a majority of common or other voting stock would because ownership of such stock confers effective control over a majority of a corporation's board of directors.

The Israeli government plainly had such an ownership interest. Uncontroverted evidence in the record shows that the Israeli government appointed representatives to the companies' respective boards. J.A. 75-76. In fact, it is because of Israel's ability to select a majority of these boards that the Dead Sea Companies qualified as "government subsidiary companies" under Israeli law. J.A. 177. Accordingly, as the decision below acknowledged, the Israeli government had the same authority over the Dead Sea Companies that "a majority shareholder would enjoy under American corporate law." Pet. App. 22a; *see also* Dead Sea Br. § I(A)(3) (arguing that Israel in fact had more authority). Thus, Israel's "ownership interest" in the Dead Sea Companies was more than sufficient to satisfy the majority ownership requirement and make it an agency or instrumentality of a foreign state under the FSIA.

B. The Natural Reading of the Majority Ownership Requirement Is Supported by the FSIA's Goal of Protecting Foreign Relations

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation omitted). Here, the purposes of the FSIA support the conclusion that a company indirectly owned by a foreign government can qualify as an agency or instrumentality of that government under the Act.

In transmitting the bill that eventually became the FSIA, the Departments of State and Justice informed Congress that one of the "broad purposes" of the proposed legislation was "to

minimize irritations in foreign relations arising out of such litigation." Ingersoll Letter, *reprinted in* H.R. Rep. No. 94-1487, at 45. This goal is embodied in the FSIA's jurisdictional provisions and procedures. As this Court has recognized, in the FSIA, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden*, 461 U.S. at 497. For example, the Act gives federal courts original jurisdiction "without regard to amount in controversy of any nonjury civil action" against foreign states. 28 U.S.C. § 1330(a). In addition, when foreign governments and their affiliated entities are sued in state courts, they have the right to remove to federal court "at any time for cause shown." *Id.* § 1441(d). Indeed, the Act even provides that, "[u]pon removal, the action shall be tried by the court without jury." *Id.* These broad jurisdictional provisions "encourage the bringing of actions against foreign states in federal courts" and thereby avoid any "disparate treatment of cases involving foreign governments," which "may have adverse foreign relations consequences." *FSIA Section-by-Section Analysis* 2-3, 39, *reprinted in* H.R. Rep. No. 94-1487, at 13, 32.

These jurisdictional provisions reflect longstanding concerns about the treatment of foreign litigants in state courts. As this Court recently observed, it was the "penchant of the state courts to disrupt international relations" with unfair treatment of foreign citizens that led the Founders to provide for alienage jurisdiction in Article III of the Constitution. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 122 S. Ct. 2054, 2058 (2002); *see also id.* at 2059 (noting Alexander Hamilton's view that "[a]n unjust sentence against a foreigner may be an aggression upon his sovereign rendering alienage jurisdiction essential to the security of the public tranquility") (quotation marks and brackets omitted). Obviously, the danger of disruption is even greater in suits against foreign governments themselves and entities that those governments own and in which they

therefore presumably have a special interest. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government."); *see also Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 814 (1st Cir. 1981) (noting that, because foreign governments often "conduct vast and critically important economic programs and projects through the device of government corporations," suits against those corporations can "have the same impact as suits against the states themselves"). Accordingly, when foreign governments and their agencies and instrumentalities are subject to suit in the United States, the FSIA affords such parties federal jurisdiction and other procedural protections designed to ensure fairness and thereby minimize the risk of any disruption in foreign relations from such litigation.

The goal of protecting foreign relations is not served by drawing a distinction between direct and indirect ownership by foreign governments. As this Court has recognized, foreign governments often use tiered corporate structures in which state enterprises are indirectly owned. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983); *see also* Anjali Kumar, *The State Holding Company: Issues and Options* 3 (World Bank Discussion Paper No. 187, 1992) (noting that "[t]he existence of state holding companies, in many variants, is widespread"). In some instances, foreign governments organize their state-owned enterprises in this manner as a "means of control of a number of public enterprises, because the government ministries find it difficult and inefficient to deal with numerous firms directly." Kumar, *The State Holding Company* at 11; *see also* United Nations, *Organization, Management, and Supervision of Public Enterprises in Developing Countries* 73 (1973) (noting that lesser developed countries often "prefer a large organization to many

independent organizations in the public sector" because they can "deal with and control the former more easily than the latter"). In other instances, foreign governments use tiered structures for the same reasons that private enterprises do: to ensure accountability and effective management, facilitate borrowing or investment, gain tax advantages, limit risk, *etc.* *See* Kumar, *The State Holding Company* at 8. *See generally* 2 Arthur Stone Dewing, *The Financial Policy of Corporations* 980-85 (5th ed. 1953). Finally, as the brief *amicus curiae* of the Irish government demonstrates, a holding company structure may be used to meet an emergency requiring swift and discrete action. *See* Brief *Amicus Curiae* the Republic of Ireland *et al.* at 7-10. None of these rationales suggests that a foreign government's concern over the treatment of the companies owned by it diminishes simply because its ownership is indirect.

Moreover, distinguishing between direct and indirect ownership can lead to arbitrary results. Under such a distinction, a corporation in which a foreign government owns 51% of the stock and thereby controls a bare majority of the corporation's board of directors would qualify as an agency or instrumentality of a foreign state. By contrast, if the same government holds 100% of the stock in a holding company, which in turn holds 100% of the stock of an operating subsidiary, and therefore controls the subsidiary completely, the operating subsidiary would not qualify as an agency or instrumentality. Obviously, however, a foreign government has a greater interest in, and control over, a company that it wholly owns indirectly than a company it barely owns directly. Indeed, a foreign government may have little interest in suits against a holding company that has few tangible assets or operations, yet be gravely concerned about suits against the holding company's subsidiaries that operate the enterprise and possess most of its concrete assets. Thus, reading a distinction between direct and indirect ownership into the majority ownership requirement may strip the companies in which

foreign governments have the most concern of the protections designed to assuage those concerns.

Even worse, the act of drawing of arbitrary distinctions between foreign government-owned enterprises may itself become an irritant in foreign affairs. The United States has no legitimate interest in whether foreign governments use tiered corporate structures for their enterprises. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984) (noting that "a business enterprise should be free to structure itself"). Moreover, where this country's foreign affairs concerns are implicated, the federal government frequently ignores distinctions between direct and indirect ownership in dealing with foreign corporations. *See, e.g., Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 485-90 (1947) (applying the Trading with the Enemy Act); *see also* Blumberg, *Control and the Partly Owned Corporation*, 10 Florida J. Int'l L. at 435-41 (discussing foreign investment and foreign trade programs). As a consequence, foreign governments could very well see a refusal to afford their state-owned enterprises the protections of the FSIA based upon indirect ownership as an arbitrary intrusion upon their sovereign authority to organize their enterprises as they choose. *See* Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention*, 26 Harv. Int'l L.J. 103, 116-17 (1985) (noting that "denial of sovereign status to a sensitive defendant can produce interstate conflict," especially if that denial is based upon an "unfair formula for determining sovereign status"); *see also* Kane, *Suing Foreign Sovereigns*, 34 Stan. L. Rev. at 418 ("The imposition of technical restrictions on the ability of a foreign state to claim sovereign immunity could create needless international friction."). The FSIA should not be interpreted in such a self-defeating manner.

Recognizing that indirect ownership can satisfy the majority ownership requirement does not confer widespread

immunity upon companies indirectly owned by foreign governments. Because government-owned corporations usually operate as "economic enterprise[s]," *First Nat'l City Bank*, 462 U.S. at 624 & n.14, and the FSIA does not afford immunity in cases arising out of commercial activities, *see* 28 U.S.C. § 1605(a)(2), such entities "rarely escape the jurisdiction of the United States courts under the FSIA." Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises under the Foreign Sovereign Immunities Act*, 90 Colum. L. Rev. 2278, 2288 (1990). In addition, the United States has concluded treaties with Israel and some other foreign governments that waive any immunity possessed by the agencies or instrumentalities of those governments that are engaged in business activities in this country. *See Treaty of Friendship, Commerce and Navigation*, Aug. 23, 1951, U.S.-Israel, art. XVIII(3), 5 U.S.T. 550, 570. *See generally* Vernon Setser, *The Immunity Waiver for State-Controlled Business Enterprises in the United States Commercial Treaties*, 1961 Proc. Am. Soc'y Int. L. 89. Thus, the primary effect of reading the majority ownership requirement to include indirect ownership is not to cloak companies indirectly owned by foreign governments with sovereign immunity, but rather to provide such companies with the procedural protections Congress thought necessary to protect this country's foreign relations.

C. The Legislative History of the FSIA Also Supports the Natural Reading of the Majority Ownership Requirement

The legislative history of the FSIA confirms that indirect ownership can satisfy the majority ownership requirement. Despite the widespread use of tiered structures by foreign governments, nothing in the legislative history of the Act suggests that Congress intended to exclude tiered entities from the scope of the FSIA's definition of agency or instrumentality. To the contrary, the history shows that Congress intended the FSIA's definition of agency or

instrumentality to extend to "a variety of forms." *FSIA Section-by-Section Analysis* at 7, *reprinted in* H.R. Rep. No. 94-1487, at 15. Indeed, to underscore the breadth of the definition, Congress listed an assortment of organizations that can qualify as an agency or instrumentality under the FSIA: "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, [or] an export association." *Id.* at 7-8, *reprinted in* H.R. Rep. No. 94-1487, at 15-16. As the government implicitly recognized in one of the questions adopted by the Court, *see* Gov't Br. I (describing the Dead Sea Companies as part of a "corporate enterprise"), the Dead Sea Companies can be aptly described as part of one of those organizations: a "mining enterprise." *See, e.g., Black's Law Dictionary* 437 (7th ed. abridged 1999) (defining "enterprise" to mean "[o]ne or more persons or organizations that have related activities, unified operation, or common control, and a common business purpose"). Even more fundamentally, an implied restriction on indirect ownership is incompatible with the legislative history's broad and deferential approach to defining an agency or instrumentality. *See, e.g., In re Air Crash Disaster Near Roselawn, Ind. on October 31, 1994*, 96 F.3d 932, 940 (7th Cir. 1996). Thus, like the language of the Act and its purposes, the legislative history shows that the majority ownership requirement covers indirect ownership.

D. The Natural Reading of the Majority Ownership Requirement Is Consistent with the Historical Treatment of Companies Indirectly Owned by the Federal Government

This interpretation is also consistent with the historical treatment of companies indirectly owned by the federal government. Corporations owned by the United States have been described as agencies or instrumentalities of the federal government both by the Court, *see, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394-99 (1995) (describing Amtrak as "an agency or instrumentality of the United

States"),[13] and by Congress, *see id.* at 397 (discussing 12 U.S.C. § 635).[14] Even more pertinently, subsidiaries of corporations directly owned by the federal government have been described in the same manner. For example, the Court described a regional agricultural credit corporation created by the Reconstruction Finance Corporation as one of the federal government's "agents or instrumentalities" in analyzing whether that corporation was immune from suit. *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 387-89 (1939). In addition, the charters of many other subsidiaries of the Reconstruction Finance Corporation state that those subsidiaries are "instrumentalit[ies] of the United States." *Reference Manual on Government Corporations* at 333 (Defense Plant Corporation); *see also id.* at 339 (noting that the Defense Supplies Corporation "shall be an *instrumentality*

[13] *See also Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946) (treating the Reconstruction Finance Corporation as a government agency for purposes of jurisdiction over government set-off); *Clallam Cty. v. United States*, 263 U.S. 341, 344-45 (1923) (finding that United States Spruce Production Corporation was "an instrumentality" of the United States immune from state taxation).

[14] *See also* 7 U.S.C. § 941 (creating a corporate body known as the Rural Telephone Bank and noting that it is "an instrumentality of the United States"); 7 U.S.C. § 1503 (creating the Federal Crop Insurance Corporation as "an agency of and within the Department" of Agriculture); 12 U.S.C. § 831r (noting that "[t]he [Tennessee Valley Authority] Corporation, as an instrumentality and agency of the Government of the United States," has access to the Patent and Trademark Office for various purposes); *id.* § 1283 (establishing the Federal Financing Bank as both a corporate body and "an instrumentality of the United States Government"); *id.* § 1441a (indicating that the Resolution Trust Corporation "shall be an instrumentality [and agency] of the United States"); *id.* § 1452 (noting that the Federal Home Loan Mortgage Corporation is an agency of the United States); *id.* § 1819 (creating the Federal Deposit Insurance Corporation as "an agency of the United States"); 15 U.S.C. § 714 (noting that the Commodity Credit Corporation is "an agency and instrumentality of the United States"); 22 U.S.C. § 290f (creating, "as an agency of the United States of America[,] a body corporate to be known as the Inter-American Foundation"); *id.* § 2191 (noting that the Overseas Private Investment Corporation "shall be an agency of the United States").

of the United States . . . possessed of the privileges and immunities that are conferred upon the Reconstruction Finance Corporation under the Reconstruction Finance Corporation Act, as amended") (emphasis added); *id.* at 442 (same with respect to the Petroleum Reserve Corporation); *id.* at 485 (same with respect to Rubber Reserve Company); *see also id.* at 32, 38, 182, 213, 225, 279 (noting that these corporations were subsidiaries of the RFC). It is therefore perfectly natural to think that Congress regards companies indirectly owned by foreign governments in the same manner.

Moreover, the structure of the Act compels this conclusion. In keeping with "the theme of equality of treatment, which has been present for some time in consideration of the foreign sovereign immunity problem," Robert B. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 45 (1978), many portions of the FSIA are "designed to place foreign governments in parity with our own federal government." Kane, *Suing Foreign Sovereigns,* 34 Stan. L. Rev. at 413. The Act provides foreign governments with a federal forum, bench trials, protections against punitive damages, and other procedural protections afforded the federal government when it is subject to suit. *See supra* p. 5. Moreover, the legislative history makes it clear that these parallels were intentional. *See FSIA Section-by-Section Analysis* at 3 ("As in suits against the U.S. Government, jury trials are excluded."), *reprinted in* H.R. Rep. No. 94-1487, at 13; *accord id.* at 17, 18, 25, *reprinted in* H.R. Rep. No. 94-1487 at 21, 23, 25-26. Thus, absent compelling evidence to the contrary, the FSIA should be interpreted to give companies indirectly owned by foreign governments the same agency-or-instrumentality status that companies indirectly owned by the federal government enjoy. Because the language of the majority ownership requirement, the purposes of the Act, and its legislative history all support this interpretation, it should be adopted.

II. THE ARGUMENTS AGAINST TREATING COMPANIES INDIRECTLY OWNED BY FOREIGN GOVERNMENTS AS AGENCIES OR INSTRUMENTALITIES UNDER THE FSIA ARE UNPERSUASIVE

The lower court, the Solicitor General, and the respondents have advanced a number of arguments for excluding companies indirectly owned by foreign governments from the scope of the FSIA. Notably absent from these arguments is any substantial analysis of the language of the majority ownership requirement, the purposes of the FSIA, its history, or its structure. Instead, the lower court, the Solicitor General, and the respondents rely on an assortment of canons of construction, background legal principles, and policies invoked without reference to the purposes of the Act. These arguments are without merit.

1. The decision below offered little analysis of the language of the majority ownership requirement. It did not, for example, explain how a distinction between direct and indirect ownership can be drawn out of the requirement that "a majority of [] shares or other ownership interests is owned by a foreign state." 28 U.S.C. § 1603(b)(2). Indeed, in its discussion of the majority ownership requirement (Pet. App. 19a-21a), the lower court did not even consider whether a foreign government that holds the shares in a company can be said to "own" the shares of that company's subsidiaries.

The lower court did assert (Pet. App. 20a) that indirect ownership of shares cannot be an "other ownership interest" based upon the canon that each word in a statute should be given effect. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 173-74 (2001). Noting that the majority ownership requirement refers to "a majority of shares" as well as "other ownership interest," 28 U.S.C. § 1603(b)(2), the lower court contended that such an interpretation would "make the majority-shareholder requirement superfluous." That is not true. As

noted above, *see supra* pp. 22-23, when general words follow more specific ones, they are not interpreted to exclude the items covered by the specific ones; instead, under the *ejusdem generis* rule, the general words are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City*, 532 U.S. at 114-15 (quotation omitted). Because such an interpretation gives effect to the particular words in such a sequence by "treating the particular words as indicating the class" covered by the general words, 2A Singer, *Statutes & Statutory Construction* § 47:17, at 285 (quotation omitted), the lower court's sole textual argument on the indirect ownership issue is without merit.

2. No doubt recognizing the weakness in the lower court's analysis, the Solicitor General advances several alternative arguments. These arguments are also unpersuasive.

a. The Solicitor General asserts (Gov't Br. 6-7) that the issue before this Court is whether the requirement should be interpreted to incorporate the apparently technical conceptions of either "actual legal ownership" or "constructive ownership." This is a false dichotomy. As noted above, *see supra* p. 15, statutes are normally interpreted according to their "ordinary, contemporary, common meaning" absent evidence of a contrary congressional intent. *Williams*, 529 U.S. at 2000 (quotation omitted). Moreover, as this Court recognized in a case cited by the Government (Gov't Br. 9 n.3), ownership is generally an "untechnical" concept. *Flink*, 279 U.S. at 63; *see also* John E. Cribbet & Corwin W. Johnson, *Principles of the Law of Property* 16 (1989) (noting that "American law has not made much use of the term ownership in [the] technical sense"). Accordingly, the concept of ownership can, and should, be interpreted according to its natural meaning rather than the technical alternatives proffered by the Government.

The Government's treatment of the "other ownership interest" prong of the majority ownership requirement is even less persuasive. In fact, the Solicitor General does not even address this prong. Instead, the Government's brief persistently asserts that the FSIA "provides that the term 'agency or instrumentality' of a foreign state includes a corporation 'a majority of *whose* shares . . . is *owned by a foreign state,*'" Gov't Br. 9 (quoting 28 U.S.C. § 1603(b)(2)) (emphasis and ellipsis deleting the phrase "or other ownership interest" in original); *accord id.* at 6, 11 — thereby once again "regrettably submerg[ing] in ellipsis" key statutory language. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring).

b. The Solicitor General also argues (Gov't Br. 7-10) that, in light of the "bedrock" principle that a corporation is separate from its stockholders, the majority ownership requirement should be limited to direct ownership. This argument is plainly without merit because the FSIA explicitly rejects the principle of corporate separation in the definition of an agency or instrumentality. Prior to the FSIA, many lower courts did not permit corporations owned in any manner by foreign governments to claim sovereign immunity on the theory that the corporations were legally separate from those governments. *See, e.g.*, Eric Schopler, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 322 § 6[b] (1969). The FSIA rejects this "separate entity rule." Far from limiting the term agency or instrumentality to entities that are legally part of a foreign government, the Act defines an agency or instrumentality to be, among other things, "a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1). In light of this square rejection of the corporate separateness principle in dealing with corporations in general, there is no reason to think that the definition of agency or instrumentality implicitly reincorporates it in dealing with tiered corporations.

In addition, the "related concept of limited corporate liability" invoked by the Solicitor General (Gov't Br. 7-8) is inapplicable here because — as this Court observed in yet another case cited by the Government (*id.* at 8) — the FSIA was "not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank*, 462 U.S. at 620-21. Finally, the corporate form can be ignored "where it is interposed to defeat legislative policies." *Id.* at 630; *accord Copperweld*, 467 U.S. at 772-73; *Bangor Punta*, 417 U.S. at 713; *Anderson v. Abbott*, 321 U.S. 349, 363 (1944); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 403-04 (1960). Because the distinction between direct and indirect ownership undermines the FSIA's goal of minimizing disruptions in foreign affairs, and in fact creates new opportunities for diplomatic friction, *see supra* pp. 26-27, the policies of the Act foreclose any application of the corporate separateness principle here.

c. The Solicitor General asserts (Gov't Br. 11) that this Court should refuse to treat entities indirectly owned by foreign governments as agencies or instrumentalities of those governments because doing so would "grant foreign states more generous immunity-based protections than foreign states extend to the United States or other foreign states." As demonstrated above, however, recognizing a company as an agency or instrumentality does not render it immune from suit under the FSIA. *See supra* pp. 27-28. In addition, while most foreign immunity laws outside the United States do not treat government-owned corporations as "foreign states," they afford foreign government-owned companies essentially the same immunity that is available under the FSIA because, in keeping with the restrictive theory of foreign sovereign immunity codified in the FSIA, they give immunity to entities performing sovereign acts. *See* Charles N. Brower *et al.*, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 Am.

J. Int'l L. 200, 210 (1979).[15] It makes no difference that companies indirectly owned by foreign governments enjoy the protections of the FSIA when subject to suit here. Nothing in either the Act or its history even remotely suggests that these protections were afforded to foreign governments and their affiliated entities out of reciprocity. To the contrary, as demonstrated above, *see supra* pp. 23-25, these protections serve America's international interests by minimizing the disruptions in foreign relations resulting from the litigation permitted by the FSIA.

d. Finally, the Solicitor General asserts (Gov't Br. 9 n.4) that, "[w]hen Congress intends legislation to embrace both a parent corporation and its subsidiaries, it typically uses more explicit language." The statutes cited by the Solicitor General, however, embrace more than just subsidiaries and their parent corporations. They extend to any entity that owns *or controls* a company,[16] a category that is different and

[15] For example, England's immunity statute provides that references in the statute to a "State" do not include "any entity . . . which is distinct from the executive organs of the government and capable of suing or being sued," State Immunity Act, 1978, c.33, § 14(1)(c) (Eng.), but then goes on to state that such a "separate entity" is immune from jurisdiction if "the proceedings relate to anything done by it in the exercise of sovereign authority" where a State would have been immune under the same circumstances. *Id.* § 14(2); *see also* European Convention on State Immunity and Additional Protocol, May 16, 1972, Eur. T.S. No. 74, art. 27, § 1 (providing that the term "'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom," but that "courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jura imperii*)").

[16] *See* 7 U.S.C. § 1a(8) (defining a "cooperative association of producers" as an entity "owned *or controlled*, directly or indirectly, by producers of agricultural products") (emphasis added); 12 U.S.C. § 221a(b)(4) (defining "affiliate" to mean any entity "[w]hich owns *or controls*, directly or indirectly," a majority of shares in a bank) (emphasis added); *id.* § 1813(w)(4)(A) (defining "subsidiary" to mean "any company which is owned *or controlled* directly or indirectly by another company") (emphasis added); *id.* § 3106(c)(1) (defining "affiliate" to mean "any company more than 5 per centum of whose voting shares is directly or indirectly owned

"more expansive" than ownership of a majority of shares or other ownership interest. Blumberg, *Control and the Partially Owned Corporation*; 10 Fla. J. Int'l L. at 422-23. As a consequence, the absence of any reference to control in the FSIA does not suggest that references to ownership are normally understood to be limited to direct ownership. It simply indicates that Congress did not want the FSIA's majority ownership requirement to cover the broader category of control. *See id.* (noting that the concept of control is often used in statutes to refer to lesser forms of control over corporate decision making than majority ownership).

3. Respondents' attempts to defend the decision below are equally unpersuasive.

a. Respondents asserted in their opposition to the petition (Pet. Opp. 16-17) that the *ejusdem generis* rule supports the decision below because it indicates that the phrase "other ownership interest" refers "not . . . to forms of indirect, inchoate means of corporate control, but to forms of securities like stock, such as convertible bonds, partnership interests, fractional interests in leases or assets, and the like." Respondents do not, however, explain what possible relevance a fractional interest in a lease has to the FSIA or how the majority interest in convertible bonds would be calculated.

---

or controlled or held with power to vote by the specified foreign bank or company") (emphasis added); 15 U.S.C. § 1802(3) (defining "newspaper owner" to mean "any person who owns *or controls* directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications") (emphasis added); 22 U.S.C. § 5605(b)(2)(F)(i)(II) (permitting suspension of "any foreign air carrier owned *or controlled*, directly or indirectly, by" certain governments) (emphasis added); 26 U.S.C. § 482 (referring to organizations "owned or *controlled* directly or indirectly by the same interests") (emphasis added); 30 U.S.C. § 184(a) (referring to "any subsidiary, affiliate, or persons *controlled* by or under common control with" certain persons) (emphasis added); 47 U.S.C. § 702(7) (defining the term "communications common carrier" to mean any "entity which owns *or controls*, directly or indirectly, *or is under direct or indirect control with*, any" common carrier) (emphasis added).

Because the *ejusdem generis* rule is applied in light of the "subject and purpose of the statute," 2A Singer, *Statutes & Statutory Construction* § 47:18, at 289, this argument is without merit.

b. Respondents also assert (Pet. Opp. 16) that interpreting the majority ownership requirement to permit indirect ownership would result in "infinite 'tiering'." Respondents do not, however, explain what is objectionable about such tiering, which FCC regulations, for example, explicitly contemplate. *See, e.g.*, 47 C.F.R. § 1.2110(c)(2)(ii)(G) (noting that "if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest").[17] Even more importantly, infinite tiering need not be permitted in order to construe the majority ownership requirement to encompass indirect ownership. The majority ownership requirement can instead be read to focus upon effective or beneficial ownership, thereby "giving effect to the substance of a foreign government's interest rather than to the form of the ownership." *Musopole v. South African Airways (Pty.) Ltd.*, 172 F. Supp. 2d 443, 447 (S.D.N.Y. 2001). Under this approach, "if Nation A owned 51 percent of Company B and Company B owned 51 percent of Company C, the beneficial interest of Nation A in Company C would be approximately 25 percent," *id.*, and Company C therefore would not qualify as an agency or instrumentality because the

[17] In addition, the "infinite tiering" interpretation has a strong textual basis. *See In re Air Crash Disaster*, 96 F.3d at 940-41. According to the FSIA, the term foreign state "includes . . . an agency or instrumentality of a foreign state." 28 U.S.C. § 1603 (a). Since that definition applies "[f]or purposes of this chapter . . . except as used in section 1608," *id.* § 1603, and the majority ownership requirement appears in that same chapter and in section 1603(b)(2) rather than section 1608, the definition of foreign state is by its terms applicable to the majority ownership requirement. As a consequence, the text of the FSIA's definitions indicate that any entity that qualifies as an agency or instrumentality is a foreign state for purposes of applying the majority ownership requirement.

foreign government's effective ownership interest is less than 50 percent. Thus, the natural reading of the majority ownership requirement simply treats corporations in which foreign governments have an effective majority interest as agencies or instrumentalities of those governments.

c. Respondents contend (Pet. Opp. 17) that reading a distinction between direct and indirect ownership into the FSIA would create a "simpler and more judicially administrable test." They do not, however, even begin to show why a simpler test is needed. While the corporate history of the Dead Sea Companies is somewhat complex, it was not at all difficult for the lower courts to determine whether a majority of the Companies were owned by the State of Israel, and this factual issue has never been a source of dispute between the parties. Moreover, respondents have not cited any case in which there was a litigated dispute over the ownership structure of a foreign government-owned company.

d. Finally, essentially conceding the difficulty of their interpretation, respondents argue (Pet. Opp. 17) that the majority ownership requirement should be construed narrowly under the presumption that "federal jurisdictional statutes should be construed narrowly." The majority ownership requirement is not, however, a jurisdictional provision: it is a definition that is grouped with the non-jurisdictional provisions of the FSIA in chapter 97 of Title 28. *See* 28 U.S.C. § 1603. Even more importantly, because the expansive jurisdictional provisions in the FSIA were intended to encourage the bringing of suits in federal courts, *see FSIA Section-by-Section Analysis* at 3, *reprinted in* H.R. Rep. No. 94-1487, at 13; *accord supra* pp. 23-24, the rule that jurisdictional provisions should be read narrowly does not apply to the FSIA. *See In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1241 (3d Cir. 1994) (recognizing that a "liberal approach in implementing the FSIA's comprehensive jurisdictional scheme

is most conducive to the FSIA's paramount objectives of keeping the federal courts open to foreign states").

III. THE PRIVATIZATION OF THE DEAD SEA DEFENDANTS DOES NOT STRIP THEM OF THE PROTECTIONS THEY ENJOYED AS AGENCIES OR INSTRUMENTALITIES OF ISRAEL

Respondents and the Solicitor General also contend that the Dead Sea Companies cannot satisfy the majority ownership requirement because they were privatized before respondents filed their claims in this case. As every court of appeals to decide the issue has recognized, *see Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1378-79 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988), this contention is incorrect. A company qualifies as an agency or instrumentality of a foreign government if it satisfies the majority ownership requirement (and other elements of the FSIA's definition of an agency or instrumentality) at the time of the conduct at issue in a case.

A. The Present Tense Can Be, and in the FSIA Is, Used to Refer to Conduct Prior to Suit

According to the Solicitor General (Gov't Br. 15), the "[m]ost telling[]" evidence that Congress intended the definition of agency or instrumentality to be applied exclusively to the time of filing is the fact that the majority ownership requirement "uses the present tense." That fact is not, however, telling at all. As a purely grammatical matter, the present tense can be used to express matters that "do not refer specifically to the present but are general timeless statements." Sidney Greenbaum *et al.*, *A Grammar of Contemporary English* § 3.25, at 85 (1972); *see also Coalition for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) ("The present tense is commonly used to refer to

past, present, and future all at the same time."). Moreover, the use of the present tense in statutory provisions is an especially poor guide because legislative drafters try, "[w]henever possible, [to] use the present tense and avoid the future and past tense." *House Legislative Counsel's Manual on Drafting Style*, HLC 104-1, § 351(f)(1) (1995); *accord* Reed Dickerson, *Legislative Drafting* § 6.5(a), at 65 (1977); Lawrence E. Filson, *The Legislative Drafter's Desk Reference* § 21.3, at 231 (1992). Indeed, according to the House of Representative's manual on drafting, "it is preferable to remain in the present tense" even when "expressing time relationships." *House Legislative Counsel's Manual on Drafting Style*, HLC 104-1, § 351(f)(2). Thus, as this Court has observed, "the tense of the verb 'be' is not, considered alone, dispositive" of the question whether a provision applies to present or past status. *Costello v. INS*, 376 U.S. 120, 125 (1964).

Moreover, mechanically reading the FSIA to refer to the time of suit merely because the present tense is used would lead to absurd results. For example, the FSIA provides that a foreign state is generally not immune from suit in cases:

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . if such act or provision of material support *is engaged in* by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . . .

28 U.S.C. § 1605(a)(7) (emphasis added). If the use of the present tense here were to dictate that the provision be applied as of the time that a suit is filed, a plaintiff would be required to file suit while an official, employee, or agent is engaged in or supporting an act of torture, hostage taking, extrajudicial killing, or the like. Obviously, however, Congress did not

intend to require hostages to file suit while they are being held hostage or the victims of extrajudicial killings to file suit while an agent of a foreign government is engaged in killing them. Accordingly, in applying this provision, courts have looked to the conduct of foreign governments prior to the filing of suit. *See, e.g., Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 21-22 (D.D.C. 2002) (examining conduct of Iranian agents in 1996 in suit filed in 2000).

The FSIA provision dealing with arbitration has been applied similarly. Under that provision, a foreign government is not immune from suit in any case:

> in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration *takes place* or is intended to take place in the United States . . . .

28 U.S.C. § 1605(a)(6). Although the reference to an arbitration taking place is in the present tense, this provision obviously refers to events prior to the filing of suit because an action to confirm an arbitration award can only take place after the arbitration has occurred. The FSIA's arbitration provision has therefore been applied to arbitrations that took place years before suit is brought to confirm the award made in the arbitration. *See, e.g., Employers Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 940-41 (7th Cir. 1999) (finding that an instrumentality of Uruguay was subject to suit to confirm an arbitration award issued in 1995 even though the petition to confirm was not filed until 1998). Thus, contrary to the Government's suggestion, the use of the present tense in the FSIA does not dictate that the Act's provisions be applied at the time of suit.

B. The Context in Which the Majority Ownership Requirement Is Used Shows that It Can Be Applied to Ownership at the Time of the Conduct Underlying Suit

Although the majority ownership requirement is couched in the present tense, it can, and in claims against privatized entities should, be applied to ownership at the time of the conduct underlying a suit. The majority ownership requirement is part of a definition, which refers not to events that occur at a particular time, but to something generic and timeless: namely, what constitutes an agency or instrumentality under the Act. Thus, by its nature, the requirement can be applied to any point in time. Moreover, the context in which this definition is used in the FSIA shows that it can be applied to the time of the conduct at issue in a case.

This Court has applied the sovereign immunity of the federal government based upon status at the time of the underlying conduct. In *The Western Maid v. Thompson*, 257 U.S. 419 (1922), two boats were sued for accidents that occurred during World War I while the boats were either under lease or charter to the United States and performing public functions. *See id.* at 430-31. Because the suits were brought after the boats had ceased to perform these functions and were returned to their private owners, the case raised the question "whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued." *Id.* at 432. The Court held no such liability attached, based upon the sovereign immunity those ships enjoyed due to the United States' possession of them at the time of the accidents. *See id.* at 433-34; *see also id.* at 433 (refusing to find that transfer of ship activated "a claim that had no existence before"). Thus, in *The Western Maid* application of sovereign immunity turned upon the status of the ships at the time of the underlying conduct.

Like domestic sovereign immunity, other status-based immunities are also applied based upon status at the time of the conduct rather than the time of suit. For example, in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court afforded President Nixon absolute immunity from a suit brought after his resignation because the suit challenged his conduct while in office: "a former President of the United States," this Court observed, "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* at 749. Other types of official immunity have similarly been applied based upon a defendant's status at the time of the underlying conduct. *See, e.g., Mitchell v. Forsythe*, 472 U.S. 511 (1985) (qualified immunity); *United States v. Johnson*, 383 U.S. 169 (1966) (legislative immunity); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (prosecutorial immunity); *Grove v. Rizzolo*, 441 F.2d 1153 (3d Cir. 1971) (judicial immunity). Diplomatic immunity similarly protects former diplomats from claims based upon their official conduct while diplomats. *See* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, art. 39; *see also* 28 U.S.C. § 254d (incorporating the immunity provisions of the Vienna Convention).

The treatment of status-based immunities presents an obvious model for the majority ownership requirement because the requirement determines whether companies owned by foreign governments are agencies or instrumentalities eligible for immunity and related procedural protections under the Act by virtue of their government-owned status. Nor is there any reason to think that Congress intended the FSIA to depart from the traditional treatment of status-based immunities. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993) (noting that federal statutes must be interpreted with a "presumption in favor of long-established and familiar principles") (quotation omitted). As the Court observed in initially recognizing foreign sovereign immunity, diplomatic immunity arises out of the same "class of cases." *The*

Schooner Exchange, 11 U.S. (7 Cranch.) at 137-39 (Marshall, C.J.). *See generally* Charles Lewis, *State and Diplomatic Immunity* 1 (1990) (noting that both "arise from the same consideration"). Even more importantly, as demonstrated above, *see supra* p. 5, 31, the FSIA is structured to provide foreign governments with protections similar to those enjoyed by the federal government. As a consequence, the legal context in which the majority ownership requirement is used indicates that the requirement can be applied to the time of the conduct underlying suit.

C. The FSIA's Goal of Protecting Foreign Relations Supports Application of the Majority Ownership Requirement to the Time of the Conduct Underlying Suit

The FSIA's goal of protecting foreign relations also supports application of the majority ownership requirement to the time of the conduct underlying suit because "the foreign policy considerations underlying sovereign immunity are not necessarily eliminated when the defendant loses its status as a foreign state before the time of filing suit." *Gen. Elec. Capital*, 991 F.2d at 1382; *accord Pere*, 150 F.3d at 481.

To begin with, in some suits against privatized enterprises, foreign governments may be the real parties in interest because of provisions indemnifying the buyers of those enterprises against claims arising out of conduct prior to the sale. *See, e.g., Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (noting that a foreign state "may remain financially responsible for any judgments won against a former state-owned entity, especially where the acts at issue occurred when the entity was still under government control"). In those cases, a rigid interpretation of the majority ownership requirement forbidding its application to privatized entities would subject foreign governments to suit without the protections of the FSIA, thereby undermining the statute's

goal of minimizing the risk of disruption of foreign relations from suits involving foreign governments.

Suits against privatized enterprises may also implicate actions of foreign governments that "remain potentially politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality." Working Group of the Am. Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 530 (2002). Consider, for example, what would happen if a formerly government-owned pharmaceutical company were sued (based upon general personal jurisdiction) for injuries suffered as a result of an emergency vaccine applied in response to an epidemic. In dealing with the epidemic, the foreign government may have been forced to make some difficult trade-offs between cost, safety, and swiftness of response. If the company could not qualify as an agency or instrumentality because of its privatization, those trade-offs would be subject to suit, discovery, and trial before an American jury — a possibility that might well prompt the very sort of protest that the FSIA was designed to avoid. Thus, for this reason as well, applying the majority ownership requirement to the time of the conduct underlying suits against privatized companies serves the FSIA's goal of protecting foreign relations.

D. The Lower Court's Arguments for Applying the Definition of Agency or Instrumentality Only at the Time of Filing Are Unpersuasive

In suggesting that the definition of agency or instrumentality can only be applied based upon the time of filing, the lower court did not rest, as the Solicitor General does, on the mere use of the present tense in the majority ownership requirement. Instead, it looked (Pet. App. 17a-19a) to the structure and the purpose of the FSIA and concluded that it was "unclear that the policies of the FSIA would be served by extending [foreign sovereign] immunity to entities

that are now private." Pet. App. 18a. The court's reasoning was, however, flawed.

According to the lower court, the FSIA "seeks to avoid affronting other governments by making it hard for private litigants to haul them into court" because claims against foreign nations and their actors "raise questions of foreign policy rather than law" and should therefore be redressed "through diplomatic channels, rather than through a civil complaint." Pet. App. 18a. Since "diplomatic channels may be of no avail in resolving a dispute between private parties," and it is not clear that a suit against a privatized agency of a foreign state "will force the state to appear" or "to pay money to a private litigant," the court of appeals reasoned that it was unclear whether the purpose of the FSIA would be served by extending sovereign immunity to privatized companies. *Id.* In addition, while acknowledging that a foreign state might be affected by the litigation of claims against former agencies or instrumentalities, the lower court concluded that "the affront to the foreign sovereign will be remote and indirect if it is not held answerable" in those suits. Pet. App. 18a-19a.

With due respect to the Ninth Circuit, these arguments display a profound misunderstanding of the FSIA. To begin with, as demonstrated above, the Act rarely makes agencies or instrumentalities of a foreign state immune from suit. *See supra* pp. 27-28. In addition, the FSIA does not seek to make it hard to haul foreign countries into court or to relegate claims against them to diplomatic channels; to the contrary, the Act was explicitly designed to "facilitate . . . litigation against foreign states," Ingersoll Letter, *reprinted in* H.R. Rep. No. 94-1487, at 45, and to discontinue the State Department's involvement in determining whether to accord foreign sovereign immunity, *see* H.R. Rep. No. 94-1487, at 8-9, 12. Finally, and most fundamentally, the FSIA does not consider affronts to foreign sovereigns to be unimportant so long as those sovereigns are not held liable for damages. Quite the contrary: recognizing that such affronts may cause diplomatic

friction, the Act seeks to protect against them by providing agencies or instrumentalities of foreign governments with procedural protections such as bench trials in a federal forum without regard to the amount in controversy. *See supra* pp. 23-25. Only by ignoring the FSIA's crucial goal of protecting foreign relations, and ascribing others to it, was the court of appeals able to question whether privatized entities should be treated as agencies or instrumentalities in suits based upon their conduct before privatization.

Noting that the FSIA contains special rules for service of process and for enforcing judgments against foreign states, the lower court also stated that it had "no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states." Pet. App. 17a-18a. While it is true that Congress contemplated suits against sitting foreign governments and the entities they continue to own or operate at the time of suit, it hardly follows that Congress intended to strip companies of the FSIA's procedural protections if they have been privatized in the interim between the conduct underlying a suit and a plaintiff's decision to file (which in this case was more than a decade). Certainly, the provisions for service of process and execution do not suggest this. The Act's service provisions relating to agencies or instrumentalities permit the same method of service used on domestic corporations, *compare* 28 U.S.C. § 1608(b)(2) *with* Fed. R. Civ. P. 4(d)(3), and the execution provisions strip agencies or instrumentalities of foreign governments of almost all immunity from execution. *See* 28 U.S.C. § 1610(b); *see generally* von Mehren, *The Foreign Sovereign Immunities Act*, 17 Colum. J. Transnat'l L. at 64-65. Even more importantly, the fact that the FSIA is primarily concerned with suits against sitting governments and their current agencies or instrumentalities hardly suggests that the historical practice with respect to status-based immunity and the purposes of the Act can be ignored in determining whether privatized companies should be stripped of the protections that they

enjoyed under the FSIA at the time of the conduct at issue in a case.

In short, the lower court could only raise a "question" about the treatment of privatized companies by disregarding the true purposes of the FSIA and grasping at seemingly irrelevant points. Even at that — with all of the court's erroneous assumptions — the most it could say was that the issue was a "close one." Pet. App. 19a. But, as recognized by every other court of appeals case to address the issue, it is not close at all. In keeping with the purposes of the Act and the doctrinal context underlying it, the FSIA plainly applies to entities that qualified as agencies or instrumentalities at the time of the conduct at issue in a case.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

TERENCE M. MURPHY
JAMES S. TEATER
MICHAEL L. RICE
JONES, DAY, REAVIS & POGUE
2727 N. Harwood Street
Dallas, TX 75201
(214) 220-3939

ROBERT H. KLONOFF
Counsel of Record
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners Dole Food Company, Inc.; Dole Fresh Fruit Company; Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd.; Standard Fruit Company; Standard Fruit and Steamship Company; Standard Fruit Company de Honduras, S.A., and Standard Fruit Company de Costa Rica, S.A.

ROBERT G. CROW
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street, 25th Flr.
Oakland, CA 94612

RICHARD C. SUTTON, JR.
RUSH, MOORE, CRAVEN, SUTTON, MOORY & BEH
2000 Hawaii Tower
745 Fort Street
Honolulu, HI 96813

Counsel for Petitioner AMVAC Chemical Corporation

SAMUEL E. STUBBS
WILLIAM D. WOOD
FULBRIGHT & JAWORSKI, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010

Counsel for Petitioners Chiquita Brands, Inc.; Chiquita Brands International, Inc.; and Maritrop Trading Corporation

ROBERT T. GREIG
BOAZ S. MORAG
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006

JOHN R. MYRDAL
STANTON CLAY CHAPMAN CRUMPTON & IWAMURA
East Tower, Suite 2100
700 Bishop Street
Honolulu, HI 96813

Counsel for Petitioners Del Monte Fresh Produce N.A., Inc.; Del Monte Fresh Produce Hawaii, Inc.; Del Monte Fresh Produce Company; and Fresh Del Monte Produce N.V.

MICHAEL L. BREM
F. WALTER CONRAD, JR.
BAKER & BOTTS, L.L.P.
910 Louisiana Street
Houston, TX 77002

Counsel for Petitioner The Dow Chemical Company

D. FERGUSON MCNIEL, III
CHARLES W. SCHWARTZ
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, TX 77002

Counsel for Petitioner Occidental Chemical Corporation

JOHN T. KOMEIJI
ROBERT T. TAKAMATSU
WATANABE, ING & KAWASHIMA
999 Bishop Street, Suite 2300
Honolulu, HI 96813

Counsel for Petitioner Pineapple Growers Association of Hawaii

R. BURTON BALLANFANT
SHELL OIL COMPANY
4856 One Shell Plaza
900 Louisiana Street
Houston, TX 77002

DALE W. LEE
KOBOYASHI, SUGITA & GODA
999 Bishop Street, Suite 2600
Honolulu, HI 96813

Counsel for Petitioner Shell Oil Company

August 23, 2002

UNITED STATES CODE
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV–JURISDICTION AND VENUE
CHAPTER 97–JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

* * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

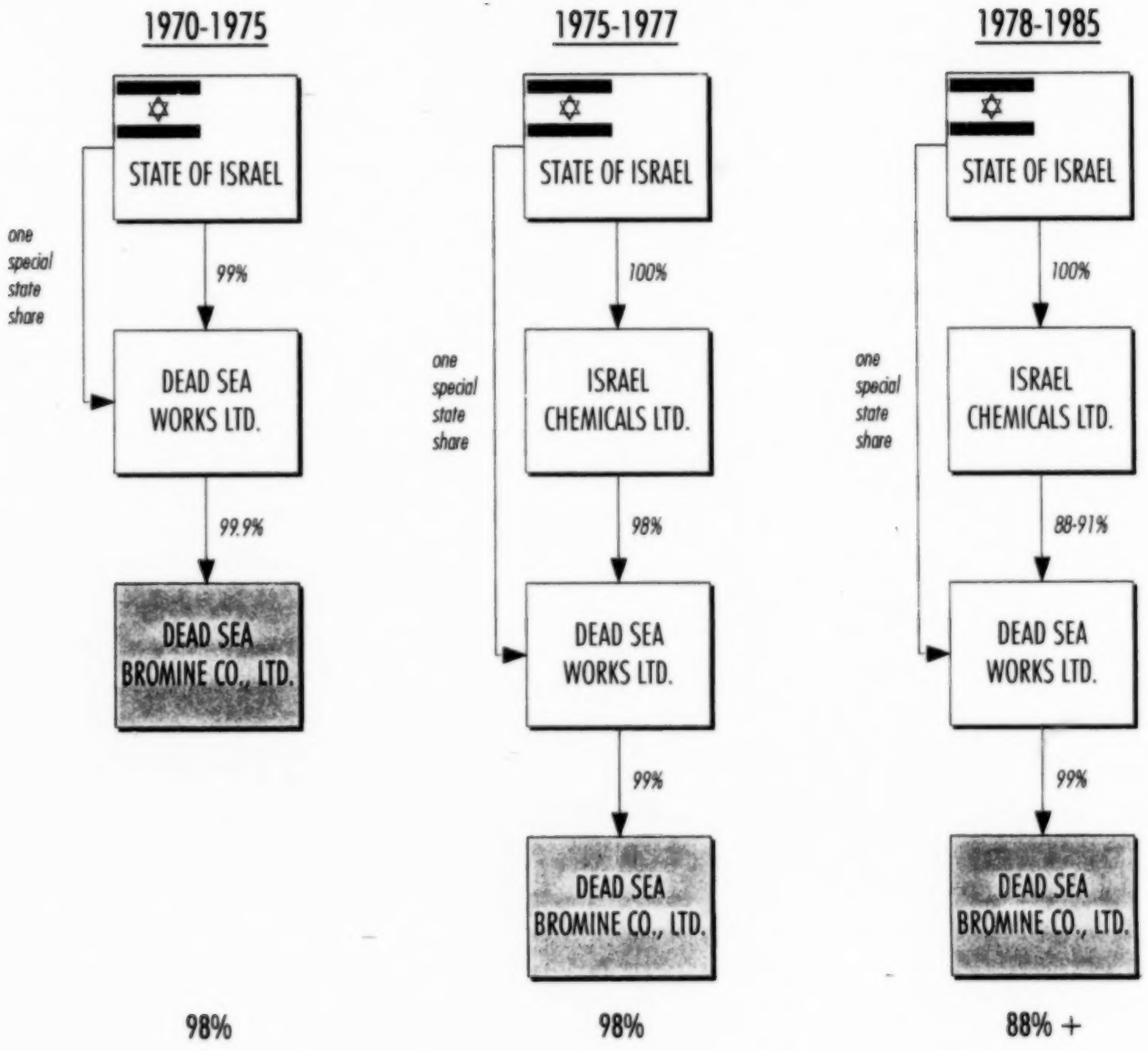
(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

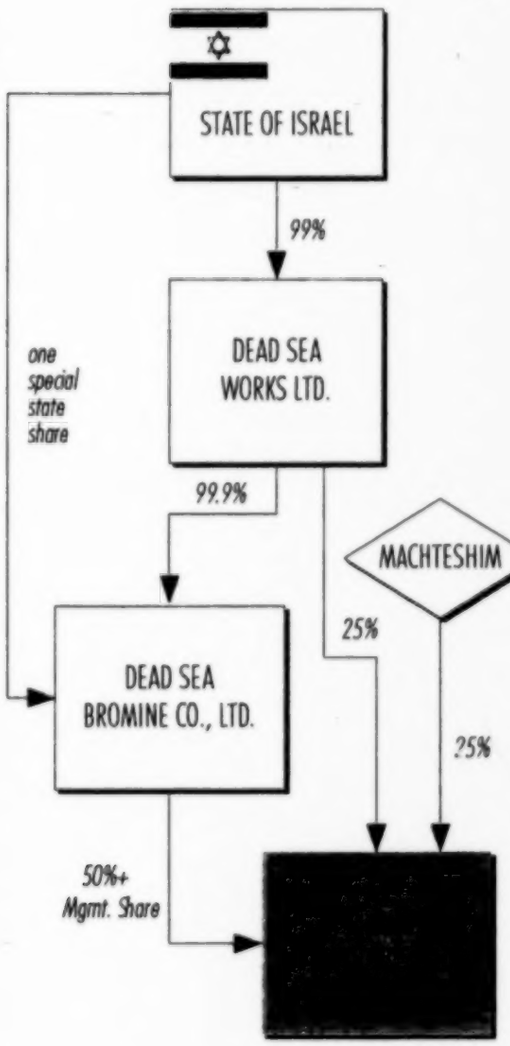
(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not

afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

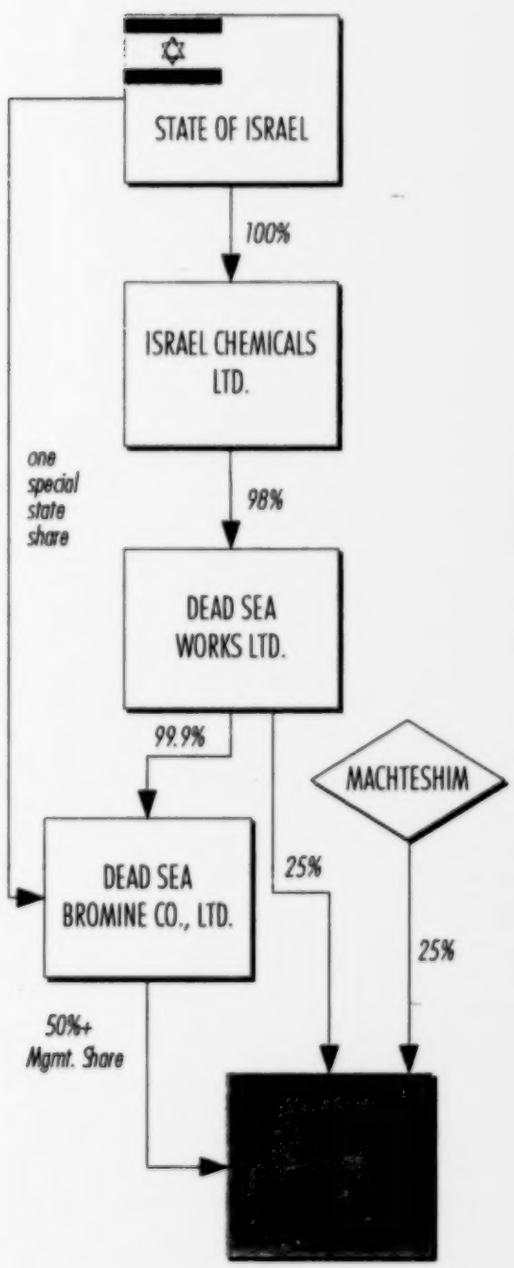

1970-1975
STATE OF ISRAEL
one special state share
99%
DEAD SEA WORKS LTD.
99.9%
DEAD SEA BROMINE CO., LTD.
98%
1975-1977
STATE OF ISRAEL
100%
one special state share
ISRAEL CHEMICALS LTD.
98%
DEAD SEA WORKS LTD.
99%
DEAD SEA BROMINE CO., LTD.
98%
1978-1985
STATE OF ISRAEL
100%
one special state share
ISRAEL CHEMICALS LTD.
88-91%
DEAD SEA WORKS LTD.
99%
DEAD SEA BROMINE CO., LTD.
88% +

1970-1975



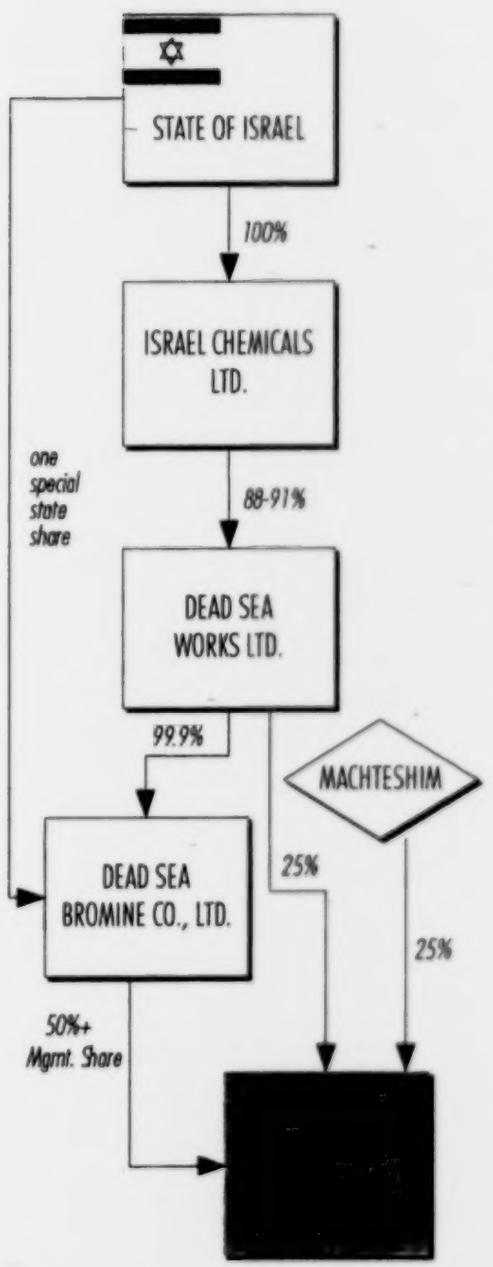
74%+ Mgmt. Share

1975-1977



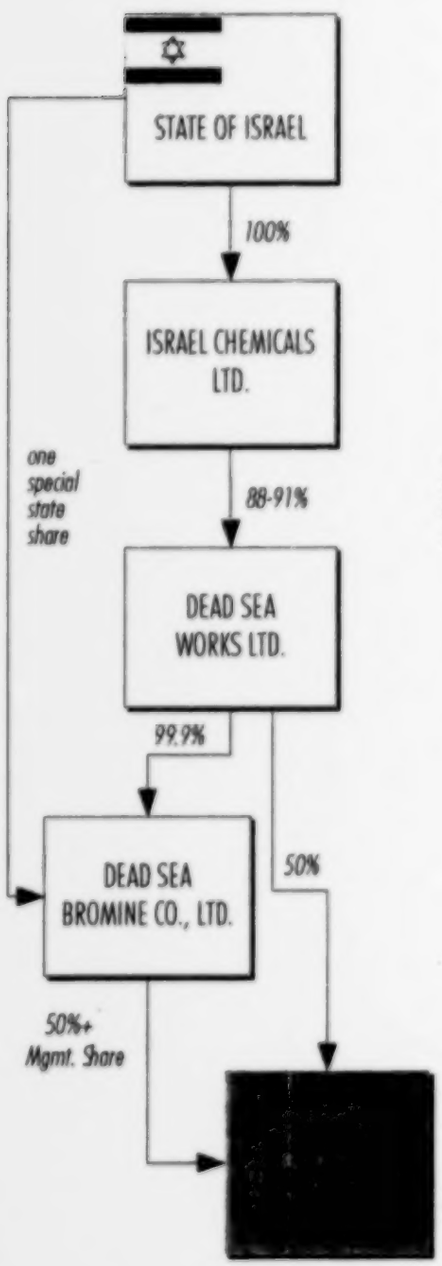
74%+ Mgmt. Share

1978-1981



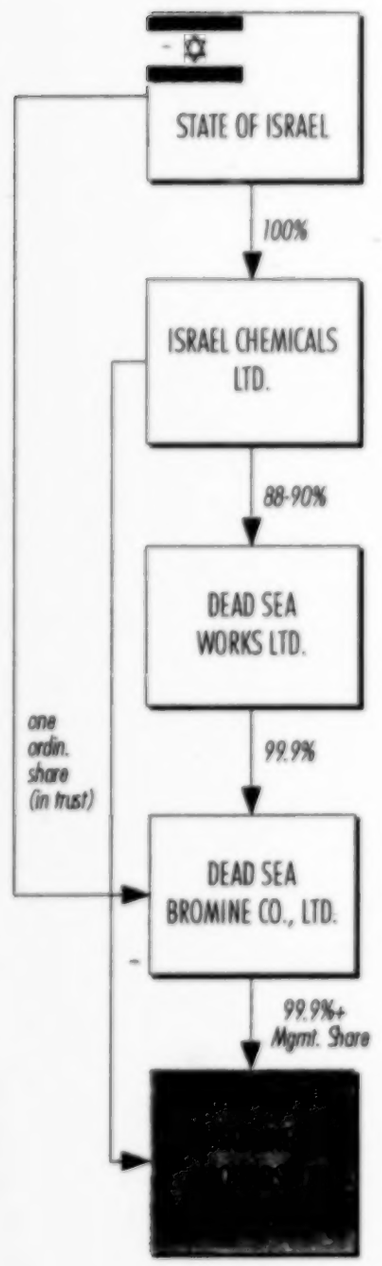
Approx. 66%+ Mgmt. Share

1981-May 1984



Approx. 88%+ Mgmt. Share

May 1984-1985



Approx. 88%+ Mgmt. Share